87-261

No.

Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation,
Petitioner,

VS.

THOMAS TELLEZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Has the United States Court of Appeals for the Ninth Circuit erred in ruling that a union-represented employee's tort claims of defamation and infliction of emotional distress over a grievable disciplinary suspension are necessarily independent of the labor agreement, setting forth the grievance procedure?

2. Has the United States Court of Appeals for the Ninth Circuit erred in ruling that a union-represented employee's tort claims based on a disciplinary suspension and notice thereof are not preempted because the specific issues raised by the claims are not explicitly addressed in the applicable labor agreement?

3. Does the court of appeals' ruling that a union-represented employee's tort claims are not preempted, although they arise from an employment relationship covered by a collective bargaining agreement, impermissibly intrude on the exclusive role of arbitration in settling disputes between parties to a labor agreement?

4. Are statements made in the ordinary course of a disciplinary procedure absolutely privileged, when disputes over discipline are subject to an exclusive and binding grievance-arbitration clause?

THE PARTIES TO THIS PROCEEDING

The parties to this proceeding are: (1) Pacific Gas and Electric Company* (hereinafter "PGandE" or Company) (Petitioner) and Thomas Tellez (Respondent).

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* PGandE is not owned by any parent company. The following is a list of PGandE's subsidiaries and affiliates and the percentage of each that PGandE owns: Pacific Indonesia LNG Company (50%); Standard Pacific Gas Lines Incorporated (85.7%). PGandE has an indirect interest in Alberta Natural Gas Company Ltd., ANGUS Chemical Company, ANGUS Fine Chemicals Ltd., ANGUS Chemie GmbH., Ltd., and Rocky Mountain Gas Transmission Company through its wholly-owned subsidiary, Pacific Gas Transmission Company. Pacific Gas Transmission Company owns 49.23% of Alberta Natural Gas Company Ltd., 100% of ANGUS Petroleum Corporation and 100% of Rocky Mountain Gas Transmission Company. Alberta Natural Gas Company Ltd. owns 98.04% of ANGUS Chemical Company, and 49% of Foothills Pipe Lines (South B.C.) Ltd. ANGUS Chemical Company owns 85% of ANGUS Biotech, Inc., 100% of ANGUS Chemie GmbH, and 80% of ANGUS Fine Chemicals Ltd.

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THOMAS TELLEZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pacific Gas and Electric Company respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit entered on May 15, 1987.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 817 F.2d 536. This decision appears in Appendix A, *infra.* (App. 1.) The order of the United States District Court for the Northern District of California granting PGandE's Motion for Summary Judgment is not published. It appears in Appendix B, *infra.* (App. 9.)

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was issued on May 15, 1987. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under Title 28 United States Code, section 1254 subdivision (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 provides in relevant part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Petitioner also relies upon the Supremacy Clause, United States Constitution Art. VI, cl. 2.

STATEMENT OF THE CASE

A. The Facts

Respondent Thomas Tellez began employment with petitioner Pacific Gas and Electric Company ("PGandE" or "Company") on February 1, 1972. In mid-1983, PGandE's Security Department conducted an investigation into potential drug and alcohol activity by Company employees at the work location where Tellez was assigned. As a result of this investigation, the Security Department issued a report in December 1983 on its observations of Tellez' involvement in drug and alcohol activity.

Based on the information contained in the security report, Mr. Richard S. Bain, the Company official who managed the department in which respondent worked, concluded Tellez was involved in illegal drug activity and imposed a 10-day disciplinary

suspension. In a letter dated December 29, 1983, Mr. Bain duly informed Tellez of his suspension and the reason therefor. Mr. Bain, in a sworn declaration to the United States District Court, Northern District of California, stated he issued the letter in accordance with the collective bargaining agreement, and sent copies to other Company officials. (App. 11). Respondent served the ten-day suspension in January 1984.

On January 4, 1984, Tellez filed a grievance under the grievance-arbitration procedures contained in the collective bargaining agreement between his union, Local Union No. 1245 of the International Brotherhood of Electrical Workers, AFL-CIO and PGandE, (App. 14) protesting the suspension. Tellez did not challenge the actual issuance or distribution of the suspension letter to other Company officials through the grievance procedure. He did, however, demand that the suspension letter be rescinded. The pertinent sections of the Local 1245-PGandE labor agreement state:

> Section 102.1
>
> * * *
>
> It is the intent of both Company and Union that the processing of disputes through the grievance procedures will give meaning and content to the Collective Bargaining Agreement.
>
> The parties are in agreement with the policy expressed in the body of our nation's labor laws that the mutual resolution of disputes through a collectively bargained grievance procedure is the hallmark of competent industrial self-government. Therefore, apart from those matters that the parties have specifically excluded by way of Section 102.2, all disagreements shall be resolved within the scope of the grievance procedure. (App. 23).
>
> * * *
>
> Section 102.2
>
> Disputes involving the following enumerated subjects shall be determined by the grievance procedures established herein:

> (a) Interpretation or application of any of the terms of this Agreement, including Exhibits thereto, letters of agreement, and formal interpretations and clarifications executed by Company and Union.
>
> (b) Discharge, demotion, suspension or discipline of an individual employee.
>
> (c) Disputes as to whether a matter is a proper subject for the grievance procedure. (App. 23-24).

The agreement also provides that an employee's grievance first be reviewed under a five-step labor-management grievance committee process. If the dispute cannot be resolved under those steps, then the matter may be submitted to arbitration before a five-member arbitration board chaired by a neutral third party. (App. 35).

The labor agreement specifies that disputes between a represented employee and the Company must be resolved exclusively pursuant to the grievance procedures. (App. 23) Moreover, the agreement expressly provides that the resolution of any employee-Company dispute under its grievance-arbitration provisions is final and binding not only on the Company, but also on Local 1245 and the employee involved in the grievance. (App. 25).

Tellez' grievance was processed through the above-described procedures. At the fifth step of the procedure, the labor-management committee essentially concluded that Tellez had not been observed engaging in any drug activity and was therefore improperly suspended. The labor-management committee ordered the Company to reimburse Tellez for wages lost as a result of his suspension, plus interest computed at the rate set forth in the Local 1245-PGandE labor agreement. In addition, the Company was ordered to rescind the suspension letter issued to respondent and to remove any reference to the alleged misconduct from his personnel records.

After the labor-management committee resolved respondent's grievance in his favor, he filed this lawsuit in state court seeking redress for injuries allegedly suffered from the disciplinary suspension. Specifically, Tellez alleged PGandE breached covenant of good faith and fair dealing implied in his employment contract

by disciplining him without sufficient cause. Further, without citing specific facts, but merely incorporating by reference the allegations supporting his first cause of action, Tellez alleged PGandE intentionally or negligently caused him emotional distress. Finally, Tellez alleged that the suspension letter defamed him. Since filing the complaint, Tellez seems to have altered the factual bases for his claims and now contends his defamation and emotional distress claims are primarily premised on the issuance and distribution of the suspension letter.

B. Proceedings Below

On February 15, 1985, PGandE filed a petition for removal of this case to the United States District Court for the Northern District of California. After the petition was granted, PGandE moved for summary judgment asserting that Tellez' claims for relief were preempted by federal labor law or, alternatively, failed to state a cause of action upon which relief could be granted, because the statements in the suspension letter were absolutely privileged. In support of its motion, PGandE submitted declarations by its Manager of Station Construction Richard S. Bain (App. 11) and one of the attorneys representing PGandE in this action and attached exhibits. Tellez filed only legal argument in opposition.

On October 8, 1985, the United States District Court for the Northern District of California granted PGandE summary judgment on all claims. (App. 9). Tellez appealed the district court's decision, as it applied to his claims for defamation and intentional and negligent infliction of emotional distress, to the United States Court of Appeals for the Ninth Circuit. On May 15, 1987, after oral argument, the court of appeals reversed and remanded the decision to the district court. The court of appeals concluded that the alleged defamation was "independent" of any right established by the labor agreement. The court further concluded the defamation claim was not inextricably intertwined with the terms of the labor agreement, and that permitting the state law claims to proceed would not infringe upon the arbitration process established by that agreement. The court of appeals supported its conclusion by noting that the labor agreement did not explicitly

require management to send written notices of suspension and did not provide guidelines in the event such notices were sent. (App. 4). The court reached this conclusion without taking into account the past practice of the parties to the agreement. It looked only to the four corners of the contract.

Further, the court noted that a jury, in considering the defamation claim, would look to the issues of intent, privilege and injury, whereas the arbitration committee would consider only whether Tellez's suspension was for just cause. Thus, the court reasoned, as the direction of inquiry and the remedies available in each forum were distinct, Tellez' claims were not preempted. (App. 5).

The court of appeals reached a similar result with respect to Tellez' two emotional distress claims. It again found that examination or interpretation of the labor agreement would not help resolve the state law claims. The court so held because "the present [labor] agreement is silent on work conditions, and vague on disciplinary formalities. It neither requires nor regulates suspension letters." (App. 7). Accordingly, even though Tellez' employment relationship with PGandE was covered by a labor agreement with an exclusive arbitration clause, the court of appeals held his claims were not preempted by federal labor law and he could, therefore, present his claims to a state court.

Finally, the court of appeals rejected PGandE's contention that, pursuant to two Court of Appeals for the Tenth Circuit decisions, the suspension letter was absolutely privileged. Although the court conceded the letter notifying Tellez of his suspension and the reason therefor caused Tellez to invoke the labor agreement's grievance process, it held the letter was not part of that process. (App. 5). As the court also concluded that the suspension letter was not required by the labor agreement, it held the letter not absolutely privileged under the Tenth Circuit decisions.

REASONS FOR GRANTING CERTIORARI

A. The Ninth Circuit Misapplied The Preemption Principles Adopted By This Court In *Allis-Chalmers v. Lueck*

For the past quarter century, rights created by collective bargaining agreements have been governed by and enforceable exclusively under federal law, in particular Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA). *Textile Workers Union v. Lincoln Mills* 1353 U.S. 448, 456 (1957). In conformity with stated Congressional policy (29 U.S.C. § 173(d)), this Court has established private arbitration, where agreed upon, as the *exclusive* method for adjudicating disputes that arise under a collective bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).

The application and interpretation of a collective bargaining agreement lie at the core of Tellez' claims. Consideration of Tellez' tort claims will *necessarily* require analysis of the collective bargaining agreement. A body of federal common law has developed, under section 301 of the LMRA, to regulate contractual relationships established through collective bargaining agreements. This federal law preempts application of state laws which would interfere with its regulatory scheme. This Court in *Allis-Chalmers v. Lueck*, 471 U.S. 202, (1985), recently set forth the principles on which this federal preemption doctrine is based.

In considering preemption of specific torts, the *Allis-Chalmers* Court focused on whether the tort action in issue confers non-negotiable state law rights independent of any right established by contract, *or* "whether evaluation of the tort claims is *inextricably intertwined* with consideration of the terms of the labor contract. *If the state tort law purports to define the meaning of the contract relationship, that law is preempted.*" *Allis-Chalmers*, 471 U.S. at 213. (emphasis added) Petitioner will show below that the Ninth Circuit erred in holding respondent's tort claims are not preempted under the aforementioned principles enunciated by this Court.

1. Respondent's Claims Do Not Involve Non-Negotiable Rights Under *Allis-Chalmers.*

The Ninth Circuit correctly determined that *Allis-Chalmers* established the law governing this case. However, it completely misapplied *Allis-Chalmers* in holding that Tellez' tort claims are independent of the collective bargaining agreement.

The Ninth Circuit held that California defamation law established nonnegotiable rights independent of any labor contract because the claim could be brought in state court regardless of a person's employment status or union membership. (App. 4). Similarly, the lower court found the emotional distress claims were actionable under state law without reference to an employment relationship. (App. 6). If the Ninth Circuit's holding is allowed to stand, all state torts of general applicability could be construed as "independent" of the labor agreement, and the exception noted in *Allis-Chalmers* would swallow the rule.

The *Allis-Chalmers* Court held that only those state torts which confer "nonnegotiable state-law rights on *employers and employees* [were] independent of any right established by contract" and not preempted by federal law. *Allis-Chalmers*, 471 U.S. at 213. (emphasis added) This Court made clear in *Allis-Chalmers* that in exempting torts independent of the labor agreement from preemption, it was referring to state laws such as those regulating minimum wages, working conditions, pension rules, work place safety and employment discrimination. *Allis-Chalmers*, 471 U.S. at 212-13 n. 7 and 8. Such laws express important state public policies protecting all employees, which cannot be waived through collective bargaining. Obviously, respondent's state law claims of defamation and infliction of emotional distress, based on the issuance of a notice of suspension letter, do not fall into this category.

Under California law, an otherwise defamatory statement is absolutely privileged if the subject of the statement consents to its publication. *Royer v. Steinberg*, 90 Cal.App.3d 490; 153 Cal.Rptr. 499 (Cal.App. 1979). If publication of suspension letters is required or allowed either explicitly or through past practice

under the labor agreement, such consent is necessarily present.[1] Whatever rights are established by California's defamation law can clearly be waived through negotiation. Similarly, a determination of whether the issuance of the suspension letter was sufficiently outrageous or negligent to support a claim of intentional or negligent infliction of emotional distress must depend on an analysis of the parties' rights and duties under the labor contract. Accordingly, contrary to the Ninth Circuit's conclusion, Tellez' claims are not independent torts.

2. Respondent's Claims Are Preempted Under *Allis-Chalmers* Because They Are Inextricably Intertwined With The Labor Agreement, Even Though They Are Not Explicitly Covered By That Agreement.

Respondent apparently claims the letter notifying him of the reason for his suspension defamed him and intentionally or negligently caused him emotional distress. In order to adjudicate these claims, a state court jury must first determine if the charges made against Tellez were false. This is the identical issue that the grievance committee resolved in determining whether respondent was suspended for good cause. Moreover, a state court jury would have to determine if the suspension letter was improperly issued and distributed. The answer to that question is found only in the collective bargaining agreement. Thus, consideration of Tellez' tort claims is inextricably intertwined with that agreement.

The Ninth Circuit ruled that Tellez' state tort claims were not preempted in part because the collective bargaining agreement "neither requires management to send written notice of suspension nor provides guidelines in the event such notice is sent." (App. 4). However, past rulings of this Court make it clear that federal law does not require the labor agreement to cover the issue in dispute in a state tort claim explicitly, in order for that claim to be preempted.

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[1] Even if Tellez alleges the publication of the letter exceeded the scope of that consent, this issue could be determined only by an examination of the requirements of the labor agreement.

In *Allis-Chalmers*, this Court held that the respondent Lueck's state tort claim, which was based on the allegedly oppressive and malicious manner in which his employer dispensed his disability payments, was preempted by section 301 of the LMRA. It *specifically rejected* the argument that federal preemption did not apply when the labor agreement explicitly provided only for the payment of benefits but not for the manner in which benefits were paid. *Allis-Chalmers*, 471 U.S. at 214-15. In so holding, this Court stated:

> Questions relating to what parties to a labor agreement agreed, and what legal consequences were intended to flow from the agreement, must be resolved by references to uniform federal law. . . . *Allis-Chalmers*, 471 U.S. at 211.

This Court emphasized that state law may not assume that a labor contract creates no implied rights. *Allis-Chalmers*, 471 U.S. at p. 215. Indeed, this has been a fundamental tenet of federal labor law for the last twenty-five years. For example, in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court held that a collective bargaining agreement is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Warrior and Gulf*, 363 U.S. at 578. It therefore found the collective bargaining agreement covered the *entire* employment relationship, not merely those issues expressly contained in the written document, and called into being "the common law of the particular industry or of a particular plant." 363 U.S. at 579. The court of appeals' ruling that Tellez' state tort actions were not preempted because the labor agreement did not provide for written notice of suspension, drastically restricts the collective bargaining agreement and repudiates this long-standing principle of federal labor law.

The labor agreement which covered Tellez' position contained a broad grievance-arbitration clause subjecting *all* disagreements to resolution through the grievance procedure. (App. 23). Management's right to discipline employees is subject to the provisions of the labor agreement. (App. 19-20). It is absurd to state that the grievance procedure requires no notice as to the reason for discipline. Such a statement implies the parties agreed to a

procedure that intentionally keeps the participants to the grievance process ignorant of the basis for the discipline. Notice of disciplinary action, and the basis for that action, to the affected employees is *central* to the negotiated grievance process because it triggers the time limits established in the agreement's grievance procedure and provides employees with any factual basis for a grievance. (App. 24). As this Court made patently clear in *Allis-Chalmers*, it is not the role of the courts to determine what form this notice must take. That determination can only be made in the contractually prescribed grievance-arbitration process by an analysis of what the parties have agreed to through an examination of the agreement, past practice, and the common law of the shop.

In *Allis-Chalmers*, this Court concluded that a labor agreement, which mandated the provision of certain employee benefits, impliedly governed the manner in which those benefits were provided. Therefore, tort claims based on the manner in which the benefits were provided were necessarily preempted by federal labor laws. *Allis-Chalmers*, 471 U.S. at 214-15. In the present case, logic compels the conclusion that the labor agreement between respondent's union and PGandE must govern the manner in which petitioner imposed its suspension against respondent. As in *Allis-Chalmers*, Tellez' tort claims, based on the manner in which his suspension was imposed, are also necessarily preempted by federal labor law.

3. The Ruling Below Conflicts With Federal Law By Eviscerating The Central Role Of Arbitration In Federal Labor Law.

The court of appeals found that allowing the state court claims to proceed would not interfere with the arbitration process. It reasoned that the arbitration committee was empowered to determine only whether Tellez was suspended for just cause and not to determine questions regarding the specific elements of the tort causes of action or to provide state law remedies. (App. 5-6). In so holding, the Ninth Circuit misread or ignored a large volume of precedent established by this Court.

In reaching its decision in *Allis-Chalmers*, this Court was particularly concerned with preserving the central role of arbitra-

tion in our "system of industrial self-government". 471 U.S. at 219 (*citing, Warrior and Gulf*, 363 U.S. at 581). Specifically, this Court observed that if a state tort claim were to be permitted on claims which could be submitted to arbitration, the parties' "federal right to decide who is to resolve contract disputes would be lost." *Allis-Chalmers*, 471 U.S. at 219. Tellez' claims could have been submitted to arbitration. Therefore, the Ninth Circuit's ruling destroys the central role of arbitration under federal law.

This Court has long held that *any dispute* regarding the employment relationship must be submitted for arbitration unless it can be said with *positive assurance* that the collective bargaining agreement precludes such coverage, and that doubts should be resolved in favor of coverage. *Warrior and Gulf* 363 U.S. at 582-83. In the present case, the labor agreement contains positive assurance the parties have agreed that *all* disputes are subject to arbitration. Section 102.2(c) of the labor agreement mandates that disputes as to whether a matter is a proper subject for the grievance procedure, shall themselves be resolved by the grievance procedure established by the agreement. (App. 23-24). The court of appeals has rewritten that agreement. This they cannot do.

Further, the Ninth Circuit held that preemption does not apply because arbitration could not provide Tellez with the remedies available under state law. If this rationale were adopted, no tort claims arising from a labor agreement would be preempted.[2] The real issue is whether Tellez' tort claims are substantially dependent upon analysis of the terms of the labor agreement. If they are, his tort claims are preempted, and only the arbitrator is empowered to grant remedies in accordance with the labor agreement negotiated by the parties. There can be no doubt that Tellez' defamation claim is preempted.

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[2] The tort claim presented by the plaintiff in *Allis-Chalmers* would have provided for compensatory and possibly punitive damages if successfully pursued in state court. *Allis-Chalmers*, 471 U.S. at 217. Since such remedies are not usually available under a labor agreement, the Ninth Circuit's reasoning would have precluded preemption of the tort claims in *Allis-Chalmers*.

Finally, the Ninth Circuit's specific ruling that Tellez' emotional distress claims were not preempted, again impermissibly intrudes on the arbitration process. The Court concluded preemption did not apply because the labor agreement does not envision outrageous behavior, and the arbitration committee had no authority to decide whether PGandE's behavior was outrageous. (App. 6). Further, the court reasoned the arbitration committee could provide no remedy. (App. 6). This holding contradicts the rulings of that and other circuits which have found that emotional distress claims arising from actions covered by the labor agreement were preempted by section 301. See *Truex v. Garrett Freight Lines, Inc.*, 784 F.2d 1347 (9th Cir. 1986); *Mitchell v. Pepsi Cola Bottlers, Inc.*, 772 F.2d 340 (7th Cir. 1985); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); *Moore v. General Motors Corp.*, 739 F.2d 311 (8th Cir. 1984); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. den.* 439 U.S. 930 (1978); *see also, Michigan Mutual Ins. Co.* v. *Steelworkers*, 774 F.2d 104 (6th Cir. 1985); *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985). The decision is also in conflict with rulings of the California Supreme Court which is the final arbiter of the laws the Ninth Circuit seeks to apply in this case.[3] There was no indication in any of these cases that the applicable labor agreement contained a provision covering outrageous behavior or provided for tort remedies for such behavior.

Indeed, the Ninth Circuit acknowledged that it has frequently held emotional distress claims preempted under section 301. (App. 7). However, it specifically distinguished two of these cases, *Olguin* and *Truex*, and presumably all similar holdings, by finding the agreement in the present case was silent on working

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[3] In *Friday v. Hughes Aircraft*, 236 Cal.Rptr. 290; 735 P.2d, hearing denied, 236 Cal.Rptr. 403; 735 P.2d 444 (1987) and *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal.3d 517; 235 Cal.Rptr. 232; 733 P.2d 614 (1987) the California Supreme Court held that state law torts arising out of an employment relationship were preempted by federal labor law. That Court found that to hold otherwise would interfere with established federal labor law policies. *DeTomaso*, 43 Cal.3d at 526.

conditions and vague on disciplinary formalities. Specifically, the court of appeals relied on its finding that the labor agreement did not require written notice of suspension. (App. 7). In so holding, the court of appeals again failed to consider the parties' past practice in interpreting the labor agreement. The impact of the court's failure to consider past practice is significant because its ruling implies that, under its analysis of the labor agreement, *no* complaint regarding working conditions or disciplinary formalities could be resolved through arbitration. According to the Ninth Circuit's reasoning, *all* such claims could be decided by state court juries. Such an outcome is indefensible under established federal labor law.

If the Ninth Circuit's ruling is allowed to stand, employees covered by a labor agreement will routinely avoid the grievance arbitration process by simply filing claims for the state torts of intentional or negligent infliction of emotional distress. This result conflicts directly with this Court's holding in *Allis-Chalmers*. Tellez could have grieved the issuance and publication of the suspension letter. He chose not to do so. He cannot now rectify that omission by presenting before a state court jury issues which are in the sole jurisdiction of the grievance-arbitration process.

B. The Ruling Below Conflicts With Another Circuit Court's Decision Holding That Statements Made As A Part Of The Disciplinary Process For Union Represented Employees Are Absolutely Privileged.

The Ninth Circuit found the suspension letter issued to Tellez was not absolutely privileged because it was not issued as part of the grievance procedure nor required by the labor agreement. (App. 5). This holding conflicts with two decisions of the United States Court of Appeals for the Tenth Circuit. The court attempted but failed to distinguish the present case from the holdings of the Tenth Circuit in *General Motors v. Mendicki*, 367 F.2d 66 (10th Cir. 1966) and *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981).

In *Mendicki*, the plaintiff alleged his employer made defamatory statements in a meeting between management and union representatives. The meeting was not a required step of the formal

grievance procedure under the applicable labor agreement, but *was* a routine practice used to limit the number of complaints sent to formal arbitration. *Mendicki*, 367 F.2d at 68-69. Nevertheless, the Tenth Circuit held the statements absolutely privileged in order to encourage frank discussion to resolve controversies arising in the employment setting. *Mendicki*, 367 F.2d at 71. The *Mendicki* court correctly realized that allowing the state law defamation action to proceed would interfere with the policy established by this Court in *Teamsters v. Lucas Fiour Co.*, 369 U.S. 95 (1981), that there must exist a single body of substantive labor law in order to give meaning to national labor policy. *Mendicki*, 367 F.2d at 72.

In *Hasten* the plaintiff alleged his employer defamed him by issuing a letter explaining the reasons for his termination. The *Hasten* court held the written notice of discipline absolutely privileged because a subsequent challenge to the disciplinary action, *triggered by that notice*, would implicate the grievance procedure. Thus, the court held the *Mendicki* holding applied. *Hasten*, 640 F.2d at 277. Although the letter at issue in *Hasten* was required under the applicable labor agreement,[4] the Tenth Circuit's holding did not rely on that fact. Rather, the *Hasten* court's ruling was based on the rationale that the notice was necessary in order to activate any subsequent grievance procedure to challenge the employer's actions. Thus, it determined the letter must be absolutely privileged to protect established federal labor law objectives.

There can be no doubt the letter sent to Tellez triggered his subsequent grievance. The Ninth Circuit actually concedes this point. (App. 5). In fact, the letter was a subject of Tellez' grievance. The Ninth Circuit's decision to deny the suspension

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[4] In *Hasten* it was clear that written notice was required by the labor agreement in order to protect the rights of the disciplined employee, by giving adequate notice of the charge against him. *Hasten*, 640 F.2d at 275 n. 2. Similarly, in the present case, written notice of suspension provided Tellez with notice of the charge against him and assured that the basis of the suspension would not change as he pursued his grievance.

letter the protection of absolute privilege because it was not *explicitly* required by the labor agreement is incomprehensible. The labor agreement requires notice to a disciplined employee to trigger the time limits of the grievance procedure. The suspension letter provided Tellez with that notice, and in fact the grievance machinery *was* set in gear as a result of the letter. The Ninth Circuit's holding would allow state court actions to interfere impermissibly with the labor agreement and the grievance procedure, and is therefore in direct conflict with the holdings of the Tenth Circuit in *Mendicki* and *Hasten.*

CONCLUSION

The Ninth Circuit's ruling allows respondent, who was covered by a collective bargaining agreement, to maintain his state tort claims based on disputes arising out of his employment relationship merely because the factual bases of the claims were not explicitly regulated by the agreement. The Ninth Circuit ruling permitted respondent to maintain these claims even though the agreement contained a broad and exclusive arbitration clause. Federal law prohibits this interpretation of the collective bargaining agreement and the unwarranted intrusion of state law into federal labor policy. Respondent's tort claims are therefore necessarily preempted. Further, the statements made in the suspension letter at issue must be absolutely privileged under federal law in order to protect the integrity of the grievance process. For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HOWARD V. GOLUB
ROBERT L. BORDON
KENNETH YANG
MAUREEN L. FRIES

By HOWARD V. GOLUB
Counsel of Record for Petitioner
Pacific Gas and Electric Company

Dated: August 13, 1987.

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 85-2774
D.C. No. CV 85-1640 EFL

Thomas Tellez,
Plaintiff-Appellant,

v.

Pacific Gas and Electric Company, Inc.,
and Does I-X, inclusive,
Defendants-Appellees.

OPINION

Argued and Submitted
December 9, 1986—San Francisco, California

Filed May 15, 1987

Before: Herbert Y. C. Choy, Alfred T. Goodwin and
Harry Pregerson, Circuit Judges.

Opinion by Judge Goodwin

Appeal from the United States District Court
for the Northern District of California
Engene F. Lynch, District Judge, Presiding

OPINION

GOODWIN, Circuit Judge:

Thomas Tellez appeals a summary judgment in favor of his employer, Pacific Gas & Electric Company, Inc. (PG&E). The district court held that Tellez's claims alleging violations of California tort law are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), or, in the alternative, lacked merit. We reverse.

Tellez has worked for PG&E since 1972, and is a member of Local No. 1245 of the International Brotherhood of Electrical Workers. The collective bargaining agreement between the union

and PG&E prohibits discipline without just cause and establishes grievance procedures for resolving employer-employee disputes.

In 1983, PG&E began investigating drug use among its employees. On December 12, 1983, a "station helper" at Tellez's station told the security department:

> On December 3, 1983, [employee #1] showed me a small package of white powder which he told me was cocaine which he was selling for $50.00 a packet. During the day, I saw [him] meet with [Tellez and two other employees]. They would walk off together and [employee #1] would return with the cash which he showed me. In the afternoon, [employee #1] told me that he had sold all of the cocaine and had made $1000.00.

On December 13, the PG&E security department asked Tellez whether he had ever been intoxicated on the job and whether he was taking any medication. Tellez denied that he had ever taken drugs or medication on the job.

Richard S. Bain, PG&E's manager of station construction, concluded from the station helper's report that Tellez had bought cocaine on the job. Bain sent Tellez a letter suspending him without pay for ten days. The suspension letter stated, in part:

> You were observed to purchase cocaine from another employee at units 7 and 8. Although you denied this allegation during the December 13 interview, we are satisfied that the transaction did occur.

Bain sent copies of the letter to eleven other PGandE managers.

Tellez's union filed a grievance and a review panel ultimately concluded that PGandE lacked just cause to suspend Tellez. The panel awarded Tellez lost wages, plus interest, and ordered PGandE to expunge the suspension order from his personnel file.

Tellez then sued PGandE in the state court, alleging breach of the duty of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress, and defamation. PGandE removed the action to federal court and moved for summary judgment of the ground that Section 301

preempted Tellez's state law claims. The district court agreed that the claims were preempted and entered judgment of PGandE. On appeal, Tellez concedes that removal was proper but argues that the district court erred in holding that Section 301 preempted his tort claims.

Section 301 vests jurisdiction in the federal courts to hear claims for violation of labor contracts. 2 U.S.C. § 185(a). Actions in federal or state[1] court alleging breach of a labor contract must either be brought under Section 301 and resolved according to federal law or dismissed as preempted. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985).

Allis-Chalmers is the leading case interpreting Section 301. The Court held that parties cannot escape the preemptive effect of Section 301 by casting their claims as tort claims rather than contract claims. *Id.* at 210. The Court held that the key to determining the scope of preemption is not how the complaint is cast, but whether the claims can be resolved only by referring to the terms of the collective bargaining agreement. *Id.* at 213. "Any other result would elevate form over substance and allow parties to evade the requirments of § 301 by relabeling their contract claims as claims for tortious breach of contract." *Id.* at 211. The Court expressed concern that such evasion could emasculate the arbitration process. *Id.* at 219. On the other hand, the Court noted that Section 301 does not preempt every dispute concerning employment or tangentially involving a collective bargining agreement; for example, state rules proscribing conduct or establishing rights and obligations independent of a labor contract are not preempted. *Id.* at 211-12.

The Court framed the test for preemption of a tort claim as whether the tort "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213.

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[1] State courts have concurrent jurisdiction over Section 301 Claims. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

Under *Allis-Chalmers*, the district court had to decide whether Tellez's claims derive from, or require interpretation of, his collective bargaining agreement. If they do not, the court must determine whether permitting the state law claims to proceed would infringe upon the arbitration process established by the collective bargaining agreement.

1. *Defamation*

Tellez alleges that PG&E defamed him by distributing copies of a letter maliciously and falsely accusing him of buying cocaine on the job. This claim neither asserts rights derived from the collective bargaining agreement, nor requires interpretation of the agreement's terms. California's defamation law establishes non-negotiable rights and obligations independent of any labor contract. One can sue for defamation regardless of employment status or union membership.[2]

Further, PG&E cannot plausibly maintain that Tellez's claim implicates the collective bargaining agreement. The agreement simply does not govern Bain's allegedly defamatory conduct. It neither requires management to send written notice of suspension nor provides guidelines in the event such notice is sent. Thus, Bain could not have been acting under the terms of the collective

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[2] Outside the Section 301 context, the Supreme Court has recognized that claims for malicious defamation are only peripherally related to the policies of the Labor Management Relations Act. *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 61 (1966). *Linn* involved the application of the preemption doctrine in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The so-called *Garmon* doctrine concerns preemption under Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157, 158, and operates to protect the primary jurisdiction of the National Labor Relations Board by making conduct arguably within the scope of Sections 7 or 8 subject to the exclusive jurisdiction of the Board. *Allis-Chalmers*, 471 U.S. at 213-14 n.9. Unlike Section 301 preemption analysis, the *Garmon* doctrine permits courts to balance federal and state interests in determining whether state law should be preempted. *Id.*; *Bale v. General Tel. Co.*, 795 F.2d 775, 780 (9th Cir. 1986). Cases such as *Linn*, which involve balancing, thus do not apply to Section 301 preemption issues. *Allis-Chalmers*, 471 U.S. at 213-14 n.9.

bargaining agreement when he sent the suspension letter. It follows that the resolution of Tellez's defamation claim does not require interpretation or consideration of the agreement.

Finally, the state court action could not supplant the arbitration process. The arbitration committee was empowered to determine only whether there was just cause for Tellez's suspension; it had no authority to decide questions of intent, privilege, and injury, and no standards by which to judge the defamation claim. The committee could award only back pay, reinstatement and expunction. State courts in tort actions, by contrast, cannot in this context make determinations of just cause for suspension, but do provide the sole means for pursuing a defamation claim for damages. The courts afford paths of inquiry and remedies totally distinct from those available through the arbitration procedure. We therefore conclude that permitting Tellez's state defamation claim to proceed does not impinge on the authority of the arbitration process contemplated by the parties' collective bargaining agreements.[3]

PG&E contends that Bain's letter was absolutely privileged, citing two Tenth Circuit cases, *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274, (10th Cir. 1981), and *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966). These cases hold that statements either required by the collective bargaining agreement or arising out of grievance proceedings are absolutely privileged. On this point we reserve judgment. In this case, PG&E's suspension letter was neither required by the collective bargaining agreement, nor a part of the grievance process (although it caused Tellez to invoke that process). *Hasten* and *General Motors* do not apply.

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[3] PG&E cites *Green v. Hughes Aircraft Co.*, 630 F.Supp. 423 (S.D. Cal. 1985), for the proposition that statements made in the context of disciplinary investigations are automatically preempted by Section 301. However, *Green* is distinguishable. The plaintiff there apparently made no showing that the allegedly defamatory statements were published beyond those who had a legitimate employment interest in them. In this case, by contrast, Tellez has alleged malicious defamation and has averred that the letter was published beyond the "need to know" level.

As an alternative ground for granting summary judgment, the district court held that Tellez's defamation claims lack merit as a matter of law. However, the complaint raises at least two genuine issues of fact: (1) whether Bain acted maliciously and with knowledge or reckless indifference as to the falsity of the charge, and (2) whether he sent the letter only to those people with a legitimate interest in the suspension.[4] We have reviewed the affidavits supporting PG&E's summary judgment motion, and are satisfied that they do not dispose of either of these issues. The pendent claims may proceed beyond summary judgment.

2. *Intentional Infliction of Emotional Distress*

Tellez's complaint alleges that PG&E deliberately and maliciously caused him extreme emotional distress by distributing the suspension letter. Tellez contends that Section 301 does not preempt this claim for two reasons. First, the tort of intentional infliction of emotional distress establishes rights and duties independent of the employment relationship. Second, to decide the claim a court need not refer to the labor agreement. We do not at this time decide whether the claim merely duplicates the defamation claim. We do hold, however, that the claim is not preempted by Section 301.

Like the tort of defamation, intentional infliction of emotional distress hinges on state of mind, causation and injury. It requires extreme and outrageous behavior when, as in the present case, no physical injury is alleged. *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 497-98, 468 P.2d 216, 218 86 Cal. Rptr. 88, 90 (1970). The collective bargaining agreement does not envision such behavior, and its grievance mechanism is not equipped to redress it. In reviewing whether there was just cause to suspend Tellez, the grievance committee would have no authority to decide whether PG&E had acted outrageously in sending the letter. Moreover, it could provide no remedy for such behavior.

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[4] California recognizes a privilege for good faith statements made in connection with employment. Cal. Civ. Code § 47(3). Because this case involves summary judgment on the pleadings, Tellez can rest on his pleadings to defeat the motion.

PG&E argues that we have frequently held claims for intentional infliction of emotional distress preempted by Section 301, citing *Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347 (9th Cir. 1985), and *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984). These cases, however, do not apply.

In *Truex*, plaintiffs were covered by a collective bargaining agreement that specified when and how discipline could be administered. Plaintiffs sued their employer in state court for intentional infliction of emotional distress, alleging that the employer issued them unjustified warning letters, supervised them excessively, and altered their work assignments. We found that plaintiffs' claims were, in essence, "claims that administration of discipline was improper under the standards set by the collective bargaining agreement." 784 F.2d at 1350. We held the claims preempted by Section 301 because they could not be resolved without recourse to the agreement. Similarly, in *Olguin*, we held that Section 301 preempted tort claims involving challenges to certain employment and work conditions covered by the collective bargaining agreement. 740 F.2d at 1475.

Unlike the agreements in *Truex and Olguin*, the present agreement is silent on work conditions, and vague on disciplinary formalities. It neither requires nor regulates suspension letters. Accordingly, examination or interpretation of the agreement would not help to resolve Tellez's claim. It follows that the claim should not be preempted.

Although Tellez's claim may eventually be shown to lack merit, we cannot so state as a matter of law. Tellez has alleged that malicious behavior on the part of Bain caused him emotional injury. His pleadings therefore raise material issues of fact that must proceed beyond summary judgment.

3. *Negligent Infliction of Emotional Distress*

For the reasons previously stated, we also remand Tellez's claim for negligent infliction of emotional distress. We note that this claim may be inconsistent with Tellez's other claims as it alleges negligent rather than intentional behavior. Nonetheless, Tellez is entitled to proceed on alternative theories until that point

in the proceedings when one or more of the claims must be abandoned.

Reversed and remanded.

Appendix B

In the United States District Court
for the Northern District of California

No. C 85 1640 EFL
Thomas Tellez,

Plaintiff,

v.

Pacific Gas and Electric Company, Inc.,
and Does I-X inclusive,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT

[Filed Oct 8, 1985]

This cause having come on to be heard on defendant's Motion for Summary Judgment on the 4th day of October 1985, and it appearing to the Court that plaintiff's claims alleging (1) breach of covenant of good faith and fair dealing; (2) intentional infliction of emotional distress; (3) negligent infliction of emotional distress; and (4) defamation are preempted by federal law or, alternatively, without any merit, it is hereby

ORDERED that defendant's Motion for Summary Judgment be granted.

DATED: OCT 8 1985

EDWARD F. LYNCH
UNITED STATES DISTRICT JUDGE

JUDGMENT

Based on the foregoing Order Granting Defendant's Motion for Summary Judgment, it is hereby

ORDERED that this action be dismissed in its entirety and with prejudice; and

FURTHER ORDERED that judgment be entered in defendant's favor with each party bearing its costs.

DATED: OCT 8 1985

EDWARD F. LYNCH
UNITED STATES DISTRICT JUDGE

Appendix C

In the United States District Court
For the Northern District of California

No. C 85 1640 EFL

Thomas Tellez,

Plaintiff,

vs.

Pacific Gas and Electric Company, Inc.
and Does I-X inclusive,

Defendant.

[Filed Sep. 6, 1985]

Declaration of Richard S. Bain
In Support of Defendant's
Motion for Summary Judgment

I, RICHARD S. BAIN, declare under penalty of perjury as follows:

1. I am currently employed by the PACIFIC GAS AND ELECTRIC COMPANY ("PGandE" or "Company") as Manager, Station Construction, General Construction Department. I was appointed to my current position in June 1975. As Manager of Station Construction, my basic duties include the construction of Company power plants such as our geothermal facility, commonly known as the Geysers.

2. I make this declaration in support of defendant's Motion for Summary Judgment.

3. In late December 1983, I reviewed an investigative report prepared by the Company's Security Department on Thomas Tellez, a General Construction Department employee at the Geysers. The Security Department had conducted an undercover investigation on illegal drug and alcohol activities by PGandE employees at the Geysers work site.

4. Based on my review of the Security Department report, I concluded that Mr. Tellez engaged in an on-duty cocaine purchase. I decided to suspend him for ten days from his employment and issued him a letter to that effect. I issued Mr. Tellez the letter in accordance with the collective bargaining agreement between the Company and Mr. Tellez's union. Attached hereto as Exhibit A is a true and correct copy of my letter to Mr. Tellez.

5. I sent a copy of my letter to Mr. Tellez to 11 Company officers, managers, and supervisors. The persons to whom I sent copies of my letter and their respective Company positions at that time are:

G. S. Bates—Vice President, General Construction
I. W. Bonbright—Manager, Industrial Relations Department
J. S. Cooper—Senior Vice President, Personnel
R. H. Cunningham—Manager, Personnel Relations Department
G. A. Maneatis—Executive Vice President, Facilities and Electric Resources Development
R. K. Miller—Vice President, General Services
L. H. Shaffer—Director, Security Department
E. C. Suess—Director, Internal Auditing
R. C. Taylor—Manager (Incoming), Personnel and General Services, General Construction Department
R. J. Thompson—Superintendent, Geysers Project, General Construction Department
R. P. Wischow—Manager, Geysers Project

I have read this and the foregoing two pages of this declaration, the statements contained therein are true and correct, and if called as a witness, I could competently testify thereto.

Executed this 5th day of September 1985 at San Francisco, California.

RICHARD S. BAIN
Richard S. Bain

EXHIBIT A

PGandE
FOR INTRA-COMPANY USES

From Division or Department	GENERAL CONSTRUCTION STATION CONSTRUCTION
File No.	83-570
Re Letter of	
Subject	Alcohol and Drug Use at Geysers
To Division or Department	

December 29, 1983

MR. T. TELLEZ:

On December 13, 1983, you were interviewed regarding your involvement in drug and alcohol use at the Geysers Project. You were allowed to return to work following your interview until a final decision could be made.

You were observed to purchase cocaine from another employee at Units 7 and 8. Although you denied this allegation during the December 13 interview, we are satisfied that the transaction did occur.

Such behavior is a violation of Standard Practice 735.6-1, Employee Conduct, and will subject you to the following disciplinary action.

You are directed to take *ten days off* without pay or benefits for your misconduct. These days will be January 3 through January 16, 1984. You will be reassigned to a different job location.

Any further misconduct of this nature on your part will subject you to more severe disciplinary action including discharge.

R. S. BAIN

RSB(5636):db

cc: GSBates
IWBonbright
JSCooper
RHCunningham
GAManeatis
RKMiller
LHShaffer
ECSuess
RCTaylor
RJThompson
RPWischow

Appendix D

AGREEMENT

THIS AGREEMENT made and entered into this first day of September, 1952, by and between Pacific Gas and Electric Company, hereinafter referred to as Company, and Local Union No. 1245 of International Brotherhood of Electrical Workers (affiliated with the American Federation of Labor-Congress of Industrial Organizations), hereinafter referred to as Union.

WITNESSETH that:

WHEREAS the parties hereto desire to facilitate the peaceful adjustment of differences that may from time to time arise between them, to promote harmony and efficiency to the end that Company, Union and the general public may benefit therefrom, and to establish wages, hours and working conditions for certain hereinafter designated employees of Company,

NOW, THEREFORE, the parties hereto do agree as follows:

GENERAL

TITLE 1. PREAMBLE

1.1 PRINCIPLES

The parties recognize that the free private enterprise system in the United States has produced the highest standard of living anywhere in the world, and they hereby confirm their adherence to, and belief in, that system. In accordance with such belief the parties support the principle of private ownership of public utilities under enlightened regulation by public authority. Further, the parties support the principle of collective bargaining and self-organization.

1.2 NONDISCRIMINATION

It is the policy of Company and Union not to discriminate against any employee because of race, creed, or religion, physical or mental handicap, sex, sexual orientation, color, age, national

origin or veteran's status as defined under any Act of Congress. (Amended 1-1-84)

1.3 SECTION TITLES

Section Titles in this Agreement are for identification purposes only and are not to be used for the purpose of interpreting either the intent or the meaning of the language of any Section. (Added 1-1-80)

TITLE 2. RECOGNITION

2.1 RECOGNITION

For the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment Company recognizes Union as the exclusive representative of those employees for whom the National Labor Relations Board certified Union as such representative in Case No. 20-RC-1454, but further including clerks in the offices of electric department foremen and technical clerks in steam generation, and excluding system dispatchers, assistant system dispatchers and rodman-chainman.

2.2 APPLICABILITY

The provision of this Agreement shall be limited in their application to employees of Company in the bargaining unit described in Section 2.1. Wherever the words "employee" and "employees" are used in this Agreement they shall, unless otherwise noted, be construed to refer only to the employees described in Section 2.1 for whom Union is the exclusive collective bargaining representative. The respective obligations of the parties herein shall be operative only insofar as Union acts in the capacity of exclusive collective bargaining representative of said employees.

TITLE 3. CONTINUITY OF SERVICE

3.1 Company is engaged in rendering public utility services to the public, and Union and Company recognize that there is an obligation on each party for the continuous rendition and availability of such services.

3.2 The duties performed by employees of Company as part of their employment pertain to and are essential to the operation of a public utility and the welfare of the public dependent hereon. During the term of this Agreement employees shall not partially or totally abstain from the performance of their duties for Company. Union shall not call upon or authorize employees individually or collectiveiy to engage in such activities and shall make a reasonable effort under the circumstances to dissuade employees from engaging in such activities, and the Company shall not cause any lockout.

3.3 Employees who are members of Union shall perform loyal and efficient work and service, and shall use their influence and best efforts to protect the properties of Company and its service to the public, and shall cooperate in promoting and advancing the welfare of Company and in preserving the continuity of its service to the public at all times.

3.4 Company and Union shall cooperate in promoting harmony and efficiency among Company employees.

3.5 Consistent with the provisions of this Title which pertain to the continuity of service to the public, employees who fill job vacancies in the classification of Serviceman or Troubleman on and after July 1, 1974, may be required to reside within the community in which the Company headquarters to which they regularly report is located, unless for good cause such requirement is waived or varied by joint agreement of Union and Company as to any such individual appointment. Such residential requirement shall be determined solely on the basis of obligations relating to the continuous rendition and availability of Company service to the public. The waiver provided for above shall be reduced to writing, the conditions thereof set forth, and signed by the Company's Manager of Industrial Relations and Union's Business Manager. (Amended 1-1-84)

For the purposes of this section, an employee will be considered to be residing in the "community" if his residence is located no more than 30 minutes automotive travel time, under ordinary travel conditions, from the employee's headquarters.

Any employee who must change his place of residence as provided herein shall be given a reasonable period of time in which to move in order to avoid personal hardship.

The local residence requirements allowing an employee to live beyond the above community standard in effect at a headquarters on June 30, 1974 shall remain in effect for each employee then subject to the provisions of this Section 3.5 until changed by agreement of said Business Manager of Union and Company's Manager of Industrial Relations.

TITLE 4. UNION SECURITY

4.1 AGENCY SHOP

(a) Thirty days after being employed, every employee covered by this Agreement shall, as a condition of employment: (1) become a member of the Union; or (2) in the alternative, an employee must tender a registration fee to the Union in such an amount as the Union may prescribe (but in no event to exceed the initiation fee required of Union members), and shall tender, monthly, an agency fee as established by the Union in an amount not to exceed the amount of the monthly dues and per capita fees required of BA members in his base wage rate; except that

(b) Any employee of Company in a classification represented by Union and who, on December 1, 1970, was an employee and was not a member of the Union, and who remains an employee continuously after December 1, 1970, is exempt from the provisions of Subsection 4.1(a) unless he or she becomes a member of Union.

(c) Any non-bargaining unit employee who is placed in a classification represented by Union shall, as a condition of employment, within 30 days comply with the provisions of Subsection (a) above. (Amended 1-1-80)

4.2 PAYMENT OF UNION DUES

Any employee who is or who becomes a member of Union shall, as a condition of employment, tender to the Union periodic dues uniformly required by Union as a condition of acquiring or retaining membership.

4.3 CHECKOFF OF DUES

Company shall deduct from wages and pay over to the proper officers of Union the membership dues of any member of Union or agency fees of any other employee as provided for in Subsection 4.1(a) who individually and voluntarily authorizes such deductions in writing. The form of checkoff authorization shall be approved by Company and Union. (Amended 1-1-83)

4.4 TERMINATION FOR NONPAYMENT OF DUES

Upon written request from the Union, the Company shall, within 21 calendar days, terminate the employment of any employee who fails to comply with the requirements of this Title.

4.5 GRIEVANCES

If any dispute arises under the provisions of this Title it shall be referred directly to the appropriate Local Investigating Committee for determination under the grievance procedure provided for in this Agreement.

4.6 (Deleted 1/1/80)

TITLE 5. UNION ACTIVITY

5.1 BULLETIN BOARDS

Union may use one-half of Company's regular bulletin boards and Company shall designate by lettering thereon or otherwise the portion of each bulletin board which shall be reserved for use by Union. Company shall erect additional bulletin boards in any location where it may be found that existing bulletin boards are not adequate.

5.2 LIMITS ON USE OF BULLETIN BOARDS

Union's use of bulletin boards shall be limited to the posting thereon of official notices of meetings and similar matters relating to official Union business and its relationship with Company. Union shall not post thereon any matter derogatory to Company or to its customers.

5.3 NONDISCRIMINATION

Company shall not discriminate against any employee because of his membership in Union or his activity on behalf of Union.

5.4 Representatives of Union

At Union's request Company shall authorize any representative of Union to enter any Company properties on which employees represented by Union are employed. Such authorization shall be for the purpose of enabling such representative to transact Union business other than the solicitation of employees to join Union or the collection of dues.

5.5 NEW EMPLOYEE ORIENTATION

Company shall include a one-page document, as submitted by Union, in the package of information provided to employees hired into classifications represented by Union summarizing the benefits of Union membership. Such document shall not include any matter derogatory to the Company or its customers. (Added 1-1-84)

TITLE 6. WAGES

6.1 Attached hereto, made a part hereof, and marked Exhibit X, is a schedule of the wage rates applicable to employees described in Section 2.1.

TITLE 7. MANAGEMENT OF COMPANY

7.1 MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, provided, however, that all of the foregoing shall be subject to the provisions of this Agreement, arbitration or Review Committee decisions, or

letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement.

7.2 BARGAINING UNIT WORK BY SUPERVISORS

Supervisors and other employees shall not perform work usually assigned to employees in IBEW 1245 bargaining unit classifications except:

(a) Such assignments are not to be deliberately made for the purpose of reducing the number of employees performing work within bargaining unit classifications.

(b) Historical assignments recognized by the NLRB and those involving continued Company practices with respect to overlapping duties of non-bargaining unit classifications and bargaining unit classifications are to be maintained unless otherwise resolved by Company and Union.

(c) Other than the above (a) and (b), such work assignments should be limited to work performed in:

(1) Emergency situations.

(2) Training of employees and demonstrating work methods.

(3) Incidental assistance and de minimis assignments. (Added 1-1-80)

7.3 CLASSIFICATIONS WITH SUPERVISORY DUTIES

In accordance with decisions of the National Labor Relations Board and Agreements between Company and Union, there are certain classifications in the bargaining unit which have supervisory duties. Company may at its discretion establish classifications which are supervisory within the meaning of the National Labor Relations Act. Upon agreement by Company and Union, Company may eliminate certain classifications which are within the bargaining unit but have supervisory responsibilities, including the elimination of such classifications from Exhibit X. (Added 1-1-80)

TITLE 8. LABOR-MANAGEMENT COOPERATION

8.1 LABOR-MANAGEMENT MEETINGS

Quarterly system joint labor-management meetings shall be regularly scheduled for the purposes of improving communications and promoting harmony and cooperation between Company and Union through discussions of matters of policy and operation which are of general system concern. The meetings will be scheduled for the fourth Wednesday of January, April, July and October, except that such meetings may be cancelled by mutual agreement or by failure to submit agenda items. (Amended 1-1-83)

8.2 AGENDA

To enable each to select representatives knowledeable in the matters of general system concern, agenda items will be submitted to the Company's Manager of Industrial Relations together with a list of employees attending for Union at least two weeks prior to the date of the next quarterly meeting. An agenda will be prepared from the items submitted and sent to the Union and Committee members designated by each as soon as possible thereafter. A summary of the Committee's discussion shall be prepared by Company and after Union review shall be distributed to each attending Committee member.

8.3 REPRESENTATION

Company's Manager of Industrial Relations and Union shall appoint their respective representatives to attend a quarterly meeting, and no restriction is placed on the number each may appoint. However, the number so appointed by each should be limited to those having knowlede of the agenda items and restricted in number in such a way as to insure an orderly presentation by each.

8.4 PURPOSE

If the Division Manager or Department Head is informed by the Union Business Representative serving his area of supervision of problems other than those subject to the grievance procedures

of the applicable contract concerning the affairs and relationship between Union and Division management or involve public affairs matters of a local nature which the Division Manager or Department Head believes could be solved or improved through joint participative discussion, the Division Manager or Department Head and Union Business Representative shall mutually arrange for a meeting at a place and time which may be during or outside of regular work hours. Such meetings (excluding a continuation of any adjourned meeting) shall take place not more often than bimonthly.

8.5 ATTENDEES AND AGENDA

After notice of a scheduled meeting, the Union may select a reasonable number of its Shop Stewards who are knowledgeable in the matters of concern conveyed to the Division Manager to attend the meeting. Ten days prior to the date set by the Division Manager for such meeting, the Union will submit to him agenda items together with a list of employees Union desires to be in attendance at the meeting. As soon as possible thereafter, an agenda will be prepared from the items submitted by the Union and those proposed by Management and sent to Union.

8.6 SUMMARY

Following the meeting, the Division Manager or Department Head will prepare a summary of the items discussed and the conclusions reached by the Committee which shall thereafter be distributed to the Union and the Company members in attendance.

8.7 WITHDRAWAL

Any Division or Department may withdraw from participation in the Local Labor-Management Committee upon Company's Manager of Industrial Relations giving notice of such intent to Union. (Amended 1-1-84)

8.8 PRODUCTIVITY ENHANCEMENT COMMITTEES

Company and Union will establish Joint Committees on Productivity Enhancement. One such committee consisting of four members appointed by Company's Manager of Industrial Rela-

tions and four members appointed by Union shall meet at the call of either party. Other Productivity Enhancement Committees will be established as agreed between Union and Company at other levels of Company's organization. Union members of such committees who are employees of Company shall be paid by Company for attendance at mutually agreed to meetings of such committees. (Added 1-1-84)

* * *

TITLE 102. GRIEVANCE PROCEDURE

102.1 STATEMENT OF INTENT—NOTICE

The provisions of this Title have been amended and supplemented from time to time. Company and Union have now revised and consolidated this Title in its entirety to provide a concise procedure for the resolution of disputes.

It is the intent of both Company and Union that the processing of disputes through the grievance procedure will give meaning and content to the Collective Bargaining Agreement.

The parties are in agreement with the policy expressed in the body of our nation's labor laws that the mutual resolution of disputes through a collectively bargained grievance procedure is the hallmark of competent industrial self-government. Therefore, apart from those matters that the parties have specifically excluded by way of Section 102.2, all disagreements shall be resolved within the scope of the grievance procedure.

Union agrees to provide grievant(s) with a copy of any settlement reached at the grievant's last known address. Such copy shall be sent by certified, U.S. mail, or handed to the grievant, within 30 calendar days of the signing of the settlement.

102.2 GRIEVANCE SUBJECTS

Disputes involving the following enumerated subjects shall be determined by the grievance procedures established herein:

(a) Interpretation or application of any of the terms of this Agreement, including exhibits thereto, letters of agreement, and formal interpretations and clarifications executed by Company and Union.

(b) Discharge, demotion, suspension or discipline of an individual employee.

(c) Disputes as to whether a matter is proper subject for the grievance procedure.

102.3 TIME LIMITS

(a) Filing

It is the intent of Company, Union and the employees that timely filed grievances shall be settled promptly. A grievance is timely filed (i) when submitted by the Union Business Representative or his alternate (hereinafter either is referred to as "Business Representative") in writing on the form adopted for such purpose to the Division or Department Personnel Manager or his alternate (hereinafter either is referred to as "Personnel Manager"); and (ii) within the following time periods:

(1) A grievance which involves the discharge of an employee must be filed not later than 14 calendar days after the employee is notified in writing of his discharge. Whether or not a grievance is filed, Company shall, at Union's request, state in writing the reasons therefor within two workdays of such request.

(2) A grievance which does not involve the grievant's discharge must be filed not later than 30 calendar days after the date of the action complained of, or the date the employee became aware of the incident which is the basis for the grievance, whichever is later. The Company shall, at Union's request, state in writing the reason for an employee's discipline, demotion or suspension within seven calendar days of receipt of such request by Union.

(b) Steps One Through Five

Extension of Time Limits

Either the Company or Union members of any of the Committees provided for in each of the following grievance Steps One through Five may, if they agree that further determination of fact is required, request an extension of time which may be granted by the other. In no event shall any extension by either or both parties

exceed one additional time period provided for at the step where the extension is granted.

102.4 FINALITY

The resolution of a timely grievance at any of the steps provided herein shall be final and binding on the Company, Union and the grievant. A resolution at a step below Step Five, while final and binding, is without prejudice to the position of either party, unless mutually agreed to otherwise.

(a) If an employee has been demoted, disciplined or dismissed from Company's service for alleged violations of a Company rule, practice or policy and Company finds upon investigation that such employee did not violate a Company rule, practice or policy as alleged, Company shall reinstate the employee and pay the employee for all time and benefits lost thereby plus interest on such reinstated pay in the amount of 7½% annum.

(b) In the event of a "continuing grievance" as set forth in Section 102.9 and Attachment A, a retroactive wage adjustment shall be made as provided therein.

(c) Provided further that nothing contained herein shall restrict or inhibit the parties or the Board of Arbitration from reducing the amount of a retroactive wage adjustment to an otherwise successful grievant where, in their absolute discretion, the equities of the situation do not call for the employee to receive a full retroactive wage adjustment.

102.5 ADJUSTMENTS

Company will make a reasonable effort to effectuate remedies provided for in a grievance settlement within 30 calendar days of such settlement.

102.6 STEPS

STEP ONE

SHOP STEWARDS

Except for disputes involving an employee's discharge, demotion, suspension, discipline or qualifications for promotion or transfer, the initial step in the adjustment of a grievance shall be a

discussion between Union's shop steward (or grievant or Business Representative if no shop stewart is assigned to his work area) and the foreman or other immediate supervisor directly involved. The foreman and shop steward may discuss the grievance with the general foreman or other supervisor of corresponding authority. The purpose of such discussion shall be to reach a satisfactory dispostion of the grievance but shall not waive or delay the filing requirements set forth in Section 102.3 above. Discussions shall be at such time and place as not to interfere with the work then in progress.

Shop stewards shall be employees of Company, and Union may designate as many shop stewards as it deems necessary for the proper administration of its affairs and for the administration of the provisions of this Agreement.

STEP TWO
LOCAL INVESTIGATING COMMITTEE

Immediately following the filing of a timely grievance, a Local Investigating Committee will be established. The Committee will be composed of the Personnel Manager, the Business Representative, the exempt supervisor whose decision is involved in the grievance, and the shop steward representing the department involved.

(1) The Personnel Manager and Business Representative will arrange for meetings of the Committee at times and places convenient for the persons involved.

(2) The Committee shall meet as soon as reasonably possible and shall make a full and complete investigation of all of the factors pertinent to the grievance. If necessary to gain all of the information required to resolve the grievance, the Committee may hold investigative interviews with other persons involved in the dispute. Except for good cause to the contrary, the grievant shall be permitted to be present during these interviews. The grievant will not be a party to the disposition of the grievance, nor is the grievant's concurrence required for the Committee to reach a settlement of the grievance. Grievant, however, does have the right to point out the existence of other facts or witnesses favorable to grievant's case.

Notwithstanding the foregoing prohibition, with the written consent of the Union's Business Manager, or his designee, the members of the Local Investigating Committee may include the grievant where he is also the shop steward representing the department involved in the grievance. In this limited situation, the shop steward/grievant may be a party to the disposition of the grievance.

(3) (a) Within 30 calendar days following the filing of a grievance which does not concern an employee's qualifications for promotion or transfer (except as provided in the next paragraph for inter-division postbids or transfer applications), or his demotion, suspension or termination of employment, the Local Investigating Committee shall prepare a report of its findings, which shall include: (i) a mutually agreed-to brief narration of all the events and factors involved in the dispute, and (ii) the Committee's mutually agreed-to findings with respect thereto. If the Committee has reached an agreeable disposition of the grievance, the report shall also contain a statement to that effect and the reasons therefor.

Inter-division postbids or transfer applications shall be subject to the further limitation, however, that the report of the employee's present Division Local Investigating Committee shall be forwarded within 15 calendar days from the date a report was requested by the bypassing Division and further, the latter Committee must dispose of the grievance, in the manner described above, no later than 15 calendar days thereafter.

If the grievance is not resolved in 30 calendar days following its being timely filed, either Company or Union may request "Certfication to Fact Finding." If "Certification to Fact Finding" is not requested by either party, the grievance shall be automatically referred to the Division or Department Joint Grievance Committee.

The referral in either event shall be accompanied by the report referred to above. The referral shall also include either an agreed-to summary or separate summaries of the reasons (facts or factors in dispute) why the Local Investigating Committee could not resolve the grievance.

If either party requests "Certification to Fact Finding," copies of the report and the request shall be forwarded to the Chairman and the Secretary of the Review Committee. If the Chairman and the Secretary of the Review Committee have rejected referral of the grievance to Fact Finding within seven calendar days following receipt of the request, or if the request is not received within the seven calendar days following the expiration of time limits stated for resolution by the Local Investigating Committee, the grievance will be automatically referred to the Joint Grievance Committee.

(b) Within 15 calendar days following the filing of a grievance which does concern an employee's qualifications for promotion or transfer (except as provided above for inter-division postbids or transfer applications), or an employee's demotion, suspension or termination of employment, the Local Investigating Committee shall prepare a report of its findings as set forth in Subsection (a) above.

If such grievance is not resolved in 15 calendar days following its being timely filed, the grievance must be referred to and accepted by the Fact Finding Committee. The referral shall also include the report referred to above and either an agreed-to summary or separate summaries of the reasons (facts or factors in dispute) why the Local Investigating Committee could not resolve the grievance.

STEP THREE
FACT FINDING COMMITTEE

The Fact Finding Committee shall be composed of the Chairman of the Review Committee or his designee, the Secretary of the Review Committee or his designee, and the Personnel Manager and the Business Representative involved in the preceding step.

The Fact Finding Committee shall hold hearings or meet at such places and times as it deems necessary to resolve the grievance. If the grievance is resolved by the Fact Finding Committee before the expiration of the 30 calendar days following the date of referral from the preceding step, the Committee

shall issue an agreed-to "Memorandum of Disposition," copies of which shall be distributed to each member of the Committee and to the grievant, and such others as the Committee determines.

If the Fact Finding Committee has not settled the grievance within 30 calendar days following receipt of or acceptance of certification, it may, by mutual agreement of the Secretary and Chairman, be:

(1) referred to arbitration; or

(2) referred to the Division or Department Joint Grievance Committee; or

(3) referred back to the Local Investigating Committee for further information and/or instructions as to the grounds for settlement; or

If none of the foregoing can be mutually agreed to, the complete grievance file shall be referred to the Review Committee.

STEP FOUR

DIVISION OR DEPARTMENT JOINT GRIEVANCE COMMITTEE

A "Joint Grievance Committee" shall be established in each geographical Division, in the Materials Distribution Department, in the Pipe Line Operations Department and in General Construction. Each Committee shall consist of three members appointed by the Company and three members appointed by the Union except that the Committee appointed in General Construction shall consist of five members appointed by Union and five members appointed by Company. The three members appointed by Union to the Materials Distribution Department shall include the member appointed to represent the office and clerical employees of such department. Employees who are appointed members of a Joint Grievance Committee shall be allowed only such time-off with pay as is necessary for attendance at the Committee's meetings.

There shall be no permanently established Joint Grievance Committee for the Communications and Building Departments

of the Company's General Office, the Gas Meter Repair Facility at Fremont and Diablo Canyon Power Plant. Whenever a case is to be referred to a Joint Grievance Committee under this procedure in any of the above-named departments, a committee shall be established consisting of three members appointed by Company's Department Head and three members appointed by Union in addition to a Company-appointed Industrial Relations Representative and a Union-appointed Business Representative. The Committee thus established shall meet within ten workdays of its establishment and shall have all the duties and perform the same functions as a Division Joint Grievance Committee with respect to the grievance or grievances on its agenda. (Amended 1-1-83)

The Committee shall, within 30 calendar days following its next regular scheduled monthly meeting date after receiving the referral and report of th Fact Finding Committee or the report of the Local Investigating Committee, whichever is applicable: (1) settle the grievance, or (2) refer the case to the Review Committee, or (3) either Company or Union may request certification from the Chairman and the Secretary of the Review Committee to refer the case directly to arbitration.

Any grievance which is not so settled within 30 calendar days or if the Chairman and Secretary of the Review Committee have not approved a request for certification to arbitration within seven calendar days after receipt of such request, the grievance shall be automatically referred to the Review Committee.

A referral to Review Committee or request for certification to arbitration shall be accompanied by a joint summary of the discussions held at the Division or General Construction Joint Grievance Committee meeting and a joint statement of the issues upon which they are in agreement, issues still in dispute and the reasons therefor, and the basis for settlement, if any advanced by each.

Notwithstanding all of the above in Step Four, Division or Department may, by mutual agreement between the Company's Division or Department Personnel Manager and Union's Business Representative, elect to replace the Joint Grievance Committee

with a Division/Department Joint Labor-Management meeting as outlined in Section 8.4 of the Agreement (Added 1-1-83)

STEP FIVE
REVIEW COMMITTEE

The Review Committee shall consist of four representatives designated by Company's Manager of Industrial Relations, one of whom shall serve as Chairman of the Committee, and four representatives designated by the Union, one of whom shall serve as Secretary of the Committee. Company will not assume payment of any expense or lost time incurred by Union members of the Review Committee.

The Chairman of the Committee shall maintain an agenda of the current cases referred to the Committee. So long as there are cases pending on the agenda, the Committee shall meet at least once each calendar month. These monthly meetings shall be scheduled for the fourth Thursday of each month unless the Chairman and Secretary agree to meet more often.

A. PRE-REVIEW COMMITTEE PROCEDURE

After the Industrial Relations Department receives the file from the Local Investigating Committee, Fact Finding Committee or the Joint Grievance Committee, as provided for in the foregoing, four copies shall be submitted to the Union's Business Office. Thereafter, and prior to docketing, the Chairman and the Secretary of the Review Committee shall meet at a mutually agreeable time and place for the following purposes:

(i) To allow Company to indicate whether or not it will implement the correction asked for. In the event Company takes such action, the grievance will, upon agreement of Union, be considered closed; or

(ii) To allow Union to indicate whether or not it will summarily reject the grievance. In the event Union takes such action, the grievance will, upon agreement of Company, be considered closed; or

(iii) To determine whether or not the file forwarded for review contains sufficient facts to enable the Review Com-

mittee to formulate a decision. In the event it is determined the file is incomplete, it shall forthwith, and prior to docketing, be returned to the source of referral for correction or supplementation.

(iv) To number and docket cases not disposed of by subparagraphs (i), (ii) and (iii) above; and

(v) To prepare a statement of issues and to endeavor to reach a preliminary understanding of grounds for settlement.

B. REVIEW COMMITTEE PROCEDURE

After the Pre-Review Committee meeting, referrals not disposed of shall automatically be added to the Review Committee Agenda.

(i) Cases for which preliminary grounds for settlement have been reached in the Pre-Review Committee meeting shall have priority over other cases. The parties shall, as expeditiously as possible, determine whether the preliminary grounds are dispositive of the matter. In the event it is not, the matter shall be treated in the same manner as any other referral.

(ii) Other referrals—Within 30 calendar days of docketing a grievance, the Company shall submit, in writing, a "Preliminary Disposition" of all new cases placed on the Agenda. Company may have a continuance for an additional 30 calendar days or until the next Review Committee meeting, whichever is later, to submit such Preliminary Disposition.

(iii) After receipt of the Preliminary Disposition, Union shall have 30 calendar days or until the next scheduled Review Committee meeting, whichever is later, to submit to the Company a "Counter-Preliminary Disposition."

(iv) After receipt of Union's "Counter-Preliminary Disposition," a matter may, at the option of either party, be set over to the next scheduled Committee meeting if, in the view of either party, compromise or settlement appears possible. Within 30 calendar days thereafter or at the conclusion of

the next scheduled meeting, whichever occurs later, the matter must be disposed of by mutual agreement, in writing, by one of the following methods:

(1) Settlement.

(2) Acceptance of Company's "Preliminary Disposition."

(3) Acceptance of Union's "Counter-Preliminary Disposition."

(4) Close the Review Committee file and remove it from its Agenda by notifying the Company's Manager of Industrial Relations and the Union's Business Manager that the case is "suspended." Following such notice, the Union's Business Manager and Company's Manager of Industrial Relations shall, within 15 calendar days, meet for the purpose of proposing an interim consultative disposition of the issues involved or, at their option, refer the case to an Ad Hoc Negotiating Committee as provided for pursuant to the provisions of Title 400 of the Physical Labor Agreement.

If a matter so suspended has not been referred to an Ad Hoc Negotiating Committee for interim negotiations within 15 calendar days of the receipt of the case from the Review Committee and, provided further, if no other disposition is made within that time period, the case may, within five calendar days of the expiration of said 15 calendar days, be filed for arbitration pursuant to the applicable provisions of the applicable Labor Agreement then in effect between the parties. If not filed for arbitration or if the 15-calendar-day limits are not waived as provided for hereafter, or if the grievance has not been withdrawn, the grievance shall be considered finally settled without prejudice.

If Ad Hoc Negotiations are agreed upon within the time periods provided, the Committee will meet and confer at the earliest date that can be arranged between them. The Committee will meet thereafter as often as

both parties deem necessary to effect an early disposition of the issues involved. The Committee is empowered to render a final, binding disposition of the case. Such decision will be reduced to writing, signed by both Union and Company, and distributed by each to Union members and Company's mamagement as each deems necessary to effectuate the decision.

If an Ad Hoc Negotiating Committee is unable to reach a dispositon of the"suspended" case within 180 days of the date the case was suspended, and if within that period of time neither party has notified the other in writing of their intent to submit said case to arbitration, then at the expiration of said 108 days, the case shall be automatically closed without prejudice, unless there is mutual agreeement that the case be terminated by other means.

While "suspended," the preliminary disposition proposed by either party may, upon mutual agreement of the parties, be placed into effect anywhere without prejudice to either party. If both have submitted preliminary dispositions that provide for different methods of resolving the issues, either or both may, by mutual agreement, be put into effect for the purpose of determining which, if either, is mutually acceptable to the parties as a solution.

To provide a favorable atmosphere for negotiating a settlement of the issue referred to an Ad Hoc Negotiating Committee and to encourage the trial of preliminary dispositions proposed by either Company or Union, the period of "suspension" will insulate Company from additional monetary liability, if that is involved in the case, in the following manner: The Ad Hoc Negotiating Committee is empowered to mutually determine in an appropriate case, the amount of retroactive wage adjustment which will accompany its disposition of the case. In no event, however, will such period of retroactive wage adjustment exceed the period of time beginning with the date the grievance was originaly filed and

ending with the 30th calendar day following the date the Union notifies Company of their election to "suspend."

The period of suspension shall end, and the insulation of Company of further liability shall cease whenever either party notifies the other of its desire to submit the case to arbitration.

(5) Referral to arbitration.

(6) Withdrawal of the grievance by Union without prejudice.

(v) Unless the parties mutually agree in writing to the waiver of the applicable time limitation in any specific instance, the failure to strictly comply with the time limits provided above shall result in:

(1) Granting, at the option of the Union, of the correction sought by the grievance if Company does not submit its "Preliminary Disposition" within the time limits set forth in Item (ii) of this Part B, or

(2) The closure of the case without adjustment and without prejudice.

(vi) Either party may request a Review Committee hearing. Such hearing will be scheduled at the earliest time possible, but shall not delay or extend the running of time limits set forth in Part B of this Procedure.

STEP SIX
ARBITRATION

A. TRIPARTITE BOARD

Either Company or Union may request, within the time limits provided in the foregoing steps, that a grievance which is not settled at one of the steps provided above be submitted to arbitration.

An Arbitration Board shall be appointed on each occasion that a grievance is timely submitted to arbitration pursuant to the foregoing provisions of this Title. The board shall be composed of

two members appointed by Company, two members appointed by Union, and a fifth member appointed pursuant to the procedure set forth in the following Subsection B. Such fifth member shall act as Chairman of the Arbitration Board and conduct hearings and render a decision in accordance with the appropriate Submission Agreement.

B. SELECTION PROCEDURE

The parties to an arbitration proceeding will make a good faith effort to mutually agree to the selection of Chairman. If they cannot, each party shall nominate two candidates from the panel established by Company and Union, Subsection C. If the parties are still unable to agree upon the selection of a Chairman, then the Chairman shall be chosen by lot from the panel names submitted.

C. PANEL OF ARBITRATORS

A panel of not more than ten arbitrators shall be established and renewed annually by the Company and the Union on January 1 of that year. Each party shall have the right to name five panelists who will remain on the panel during the calendar year.

102.7 Individual Dispute Adjustment

Pursuant to the provisions of Subsection 9(a) of the Labor Management Relations Act of 1949, as last amended, no provision of this Title shall be construed to restrict or prohibit an individual employee or group of employees from presenting his disputes to Company and to have such disputes adjusted without the intervention of Union, provided that the adjustment shall not be inconsistent with the terms of this Agreement, and that Union shall be given an opportunity to be present at such adjustment.

An employee's election under this Section shall not preclude his later consenting to Union's filing a grievance on his behalf if the employee is not satisfied with the results. Such grievance, however, must be filed within the time limits provided in Section 102.3, and such time limits are not delayed or suspended by the grievant's original choice to pursue the dispute without Union's intervention.

Unless the employee consents to Union's later filing of a timely grievance, the procedures and grievance "steps" set forth in the foregoing Sections of this Title are not available to the employee.

102.8 Enabling Clause

By written agreement between Company and Union, other provisions may be substituted for or added to the provisions of this Title.

102.9 Attachments

In addition to the provisions of Section 105.5 of this Agreement, the Master Apprenticeship Agreement, the Benefit Agreements, Training Agreements, and other special agreements that may be executed from time to time under Section 102.8, the provisions of this Title shall also include the following attachments which are set out elswehere in this Agreement.

(a) Continuing Grievances

(b) General Construction Department Supplemental Grievance Procedure

(Entire title amended 1-1-80)

Attachment A

LABOR AGREEMENT INTERPRETATION

SUBJECT: Retroactive Wage Adjustment—Continuing Grievances

SECTION 102.2—Physical Agreement

SECTION 9.2—Clerical Agreement

For the purpose of determining the extent of a retroactive wage adjustment resulting from the submission of a continuing grievance timely filed under the applicable provisions of Section 102.2 or 9.2, the following procedure will be observed. For this purpose, a "continuing grievance" is defined as a continuing course of conduct allegedly in violation of the Labor Agreement as opposed to a single isolated and completed transaction.

1. The period of retroactive wage adjustment shall not exceed thirty (30) calendar days prior to the date of filing such grievance in writing in the form and manner prescribed by Section 102.2 or 9.2, whichever is applicable, *unless*

2. It can be established that sometime prior to filing the grievance, as provided above, the grievant requested his or her supervisor to make the same correction, during the period of that continuing course of conduct, and a supervisor of grievant, who is authorized to make the correction, had declined to do so. The period of retroactive wage adjustment in this case (or an adjustment made pursuant to the provisions of Section 102.7 or 9.7) shall commence with the date it can be established that grievant made such request. In either event, however, if the request was made within thirty (30) calendar days of the day the alleged violation first occurred, the adjustment shall commence with the first day the violation occurred.

It is further understood and agreed that this interpretation shall in no way limit Company's right to make further wage adjustments which result from unintentional or inadvertent errors which are not alleged to be a matter of law or interpretation of the Labor Agreements.

For Union: Ronald T. Weakley
Its Business Manager
Date: March 17, 1969

For Company: I. W. Bonbright
Its Manager of Industrial Relations
Date: March 17, 1969

Attachment B

May 15, 1980

Local Union No. 1245
International Brotherhood of
Electrical Workers, AFL-CIO
P. O. Box 4790
Walnut Creek, California 94596

Attention: Mr. Dean Cofer, Business Manager

Subject: Revision of February 4, 1977 and February 21, 1979,
General Construction Department
Supplemental Grievance Procedure

Gentlemen:

Pursuant to the revised provisions of Section 102.8 and 102.9, and following discussions with your representative and General Construction, we propose the following revisions of the above-subject supplemental grievance procedure for General Construction:

1. LOCAL INVESTIGATING COMMITTEE

The Local Investigating Committee (LIC) for General Construction will be composed of the Department's Personnel Manager and the Union's assigned Business Representative or their designee. However, when investigations and/or interviews must be conducted in the field by the LIC, the Shop Steward and the Supervisor involved in the grievance will be allowed to participate in such investigations/interviews. Their participation will be in an advisory capacity, and they will not vote on the disposition of the grievance.

The LIC shall meet as soon as reasonably possible after the filing of the grievance. The LIC shall make a full and complete investigation of the pertinent facts and draft a report of its findings immediately following the conclusion of the investigation.

The grievance must be either settled or the report must be received by the Joint Grievance Committee within 60 calendar days following the filing of a grievance which does not concern an

employee's demotion, suspension, discipline or discharge. Grievances involving the above enumerated matters shall either be settled or the report received by the Joint Grievance Committee within 30 calendar days following the filing of the grievance.

The LIC report shall contain:

1. A statement of the dispute

2. A mutually agreed to summary narration of all the events and factors involved in the dispute

3. The LIC's mutually agreed to findings

4. A brief statement of position by Company and by Union

5. A brief statement on behalf of each party regarding facts, factors or findings that they have not agreed to

6. Signature of the report by each member

II. JOINT GRIEVANCE COMMITTEE

The functions of the Joint Grievance Committee (JGC) are set forth in Title 102 of the Agreement. In addition to these general functions, the Committee will maintain a monthly agenda of all grievances at the LIC and JGC level. The nature of all grievances and their dispositions or status will be noted on the agenda.

Grievances referred to the JGC shall be disposed of in one of the following ways (within 120 calendar days following the filing dates of grievances which do not concern the employee's demotion, suspension, discipline or discharge; within 90 days for grievances involving the above enumerated matters):

A. By settlement

B. By referrel to the Review Committee

Referrals shall be accompanied by the LIC report as provided in I. (1-6) and signed by at least one Union member and one Company member from the JGC.

III. LACK OF TIMELY DISPOSITION

It is the intent of the parties that the time limits set forth above for the disposition of grievances shall be strictly construed. Therefore, any grievance not disposed of in the times provided will be deemed to be filed with the Review Committee and subject, thereafter, to final and binding resolution or submission to arbitration by either party at that level.

IV. FINAL DISPOSITION

The disposition of a grievance in a manner provided above shall be final and binding on the employee, Company and Union.

In agreeing to the above supplementary grievance procedure, Company and Union understand that it in no way supplants the provisions of Title 102 of the basic Labor Agreement. For this reason, either Company or Union may terminate this procedure at the expiration of 30 calendar days following receipt by either party of such notice of intent. Should either party exercise the right to terminate, all grievances pending at the expiration of such time period will be adjusted on the basis of the provisions of Title 102 of the basic Labor Agreement. Time limits for grievances filed prior to January 1, 1979, will be a maximum of 150 days from the filing date to settlement or referral to the Review Committee.

If you are in accord with the foregoing and agree thereto, please so indicate in the space provided below and return one executed copy of this letter to Company.

Yours very truly,

PACIFIC GAS AND ELECTRIC COMPANY

By _____
I. W. Bonbright
Manager of Industrial Relations

The Union is in accord with the foregoing and it agrees thereto as of the date hereof.

LOCAL UNION NO. 1245.
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

By _____
Dean Cofer
Business Manager

June 18, 1980

TITLE 103. HOLIDAYS

Only regular employees who are not on a "leave of absence" and who:

(a) are paid for the workdays immediately before and after the holiday, or

(b) are off work with permission, but without pay, for reasons of illness or disability, on the workdays immediately before and after the holiday, or

(c) are paid for the workday either before or after the holiday but are off work with permission without pay on the other day.

shall, except as provided im Section 103.7, be entitled to have the following holidays off with pay when they fall on a work-day in his basic workweek:

New Year's Day	(January 1)
Washington's Birthday	(3rd Monday in February)
Memorial Day	(last Monday in May)
Independence Day	(July 4)
Labor Day	(1st Monday in September)
Veteran's Day	(November 11)
Thanksgiving Day	(4th Thursday in November)
Friday after Thanksgiving	(see 103.5 below)
Christmas Day	(December 25)
Employee's Birthday	(see Section 103.2)
Two Floating Holidays	(see Section 103.3)

103.2 BIRTHDAY HOLIDAYS

(a) Except as provided in Subsections (b) and (c) hereof, an Employee's Birthday shall be the workday immediately preceding his next scheduled non-workday which next follows his birthday.

(b) An employee by written agreement with his immediate supervisor not in the bargaining unit may elect to take another day as his Birthday Holiday. Such agreement must be reached at least 15 days in advance of his birthday. (Amended 1-1-84)

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-261

In The

Supreme Court of the United States

October Term, 1987

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PACIFIC GAS AND ELECTRIC COMPANY,
a California Corporation,

Petitioner,

vs.

THOMAS TELLEZ,

Respondent.

———o———

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

———o———

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QUESTIONS PRESENTED

1. Should this Court review a ruling by the United States Court of Appeals for the Ninth Circuit that a union employee's state tort claims for defamation and infliction of emotional distress are not preempted by federal labor law when they do not arise from working conditions or collectively bargained grievance procedures?

2. Should this Court review a ruling by the United States Court of Appeals for the Ninth Circuit that a union employee's tort claims for defamation and intentional infliction of emotional distress were not preempted by federal labor law when they arose from the misrepresentations contained in a letter which was not mandated by the collective bargaining agreement and not part of the collectively bargained grievance procedure?

3. Should this court review a ruling by the United States Court of Appeals for the Ninth Circuit that the misrepresentations contained in a letter which was not contractually mandated and not part of the collectively bargained grievance procedure, are not absolutely privileged?

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No. 87-261

In The

Supreme Court of the United States

October Term, 1987

PACIFIC GAS AND ELECTRIC COMPANY,
a California Corporation,

Petitioner,

vs.

THOMAS TELLEZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Thomas Tellez respectfully prays that Petitioner Pacific Gas and Electric Company's petition for writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit entered on May 15, 1987, be denied.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 817 F.2d 536. This decision appears in Appendix A (App. 1) of Petitioner's brief. The order of the United States District Court for the Northern District of California granting PGandE's Motion for Summary Judgment is not published. It appears in Appendix B (App. 9) of Petitioner's brief.

———o———

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was issued on May 15, 1987. The petition for a writ of certiorari was filed within 90 days of that date. This response is filed within 30 days of the filing of the petition for a writ of certiorari. The Court's jurisdiction is invoked under Title 28 United States Code, section 1254 subdivision (1).

———o———

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 provides in relevant part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be

> brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

———o———

STATEMENT OF THE CASE

A. The Facts

Respondent Thomas Tellez has been employed by Petitioner PGandE since 1972, and is a member of Local 1245 of the International Brotherhood of Electrical Workers.

On December 12, 1983, during an investigation of drug use among employees at the Geysers facility, a "station helper" told the security department:

> On December 3, 1983 [employee #1] showed me a small package of white powder, which he told me was cocaine, which he was selling for $50.00 a packet. During the day, I saw [him] meet with [Tellez and two other employees]. They would walk off together and [employee #1] would return with the cash which he showed me. In the afternoon, [employee #1] told me that he had sold all of the cocaine and made $1,000.00.

On December 13, 1983, Tellez was questioned about drug or alcohol use on the job. He was not told about the station helper's statement. Tellez denied ever using drugs or alcohol on the job and heard nothing further, until December 29, 1983, when he was suspended for ten days, and received a letter from Richard S. Bain, manager of station construction. That letter said, in relevant part:

> You were observed to purchase cocaine from another employee at units 7 and 8. Although you denied this

> allegation during the December 13 interview, we are satisfied that the transaction did occur.
>
> (Petitioner's App. C., Exhibit A).

Bain sent copies of the letter containing this misrepresentation of the "eye witness" report to eleven other PGandE management employees. In a sworn declaration to the United States District Court, Northern District of California, Bain stated that he based this accusation on a review of the Security Department report containing the station helper's statement. (Petitioner's App. C). The declaration does not indicate that anyone else reviewed the report or drew the conclusions contained in the accusations of the December 29 letter, although the letter does stated that "*we* are satisfied that the transaction did occur." (emphasis added). The declaration also states that the letter was issued in accordance with the collective bargaining agreement between the Company and Mr. Tellez' union (Petitioner's App. C.), but a review of the collective bargaining agreement (Petitioner's App. D.) indicates that there is no requirement for written notice, nor does the agreement contain any procedures for imposition of discipline. The agreement begins with procedures for filing a grievance, once the disputed discipline has been imposed. (Petitioner's App. p. A23).

Tellez filed a timely grievance through his union, and nine months later a review panel ultimately concluded that PGandE had insufficient evidence for a just cause suspension. Tellez was awarded lost wages and interest and the letter was removed from his personnel file.

Within one year from the publication of Bain's letter, Tellez brought suit in state court, alleging breach of the

duty of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation. PGandE removed the action to Federal Court, and moved for summary judgment on the ground that Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185(a) preempted Tellez' state law claims. The District Court agreed and entered judgment on behalf of PGandE.

Tellez conceded preemption of his cause of action for breach of duty of good faith and fair dealing, because it would have required reference to the terms of the contract establishing the steps of the grievance procedure. However, he appealed the dismissal of his causes of action for defamation and intentional infliction of emotional distress because those claims are not based on the actual discipline imposed nor do they require reference to the terms of the collective bargaining agreement. On May 15, 1987, the Ninth Circuit Court of Appeals reversed the decision of the District Court, concluding that the defamatory statements were independent of any right established by the labor agreement and that the evaluation of the tort claims was not inextricably intertwined with consideration of the terms of the labor agreement. The Court of Appeals also found that since the letter was not mandated by the collective bargaining agreement, and the statements were not made within the course of grievance procedure, the letter was not absolutely privileged.

REASONS FOR DENYING CERTIORARI

A. The Ninth Circuit Properly Applied The Preemption Principles Adopted By This Court In Allis-Chalmers v. Lueck.

Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) is the leading case interpreting Section 301 of the Labor-Management Relations Act. In that case, the Court held that the key to determining the preemption of state tort claims is consideration of whether the claims can be resolved only by referring to the terms of the collective bargaining agreement. *Id.* at 213. On the other hand, the Court noted that Section 301 does not preempt every dispute concerning employment, or tangentially involving a collective bargaining agreement. *Id.* at 211-12. Petitioner's argument that the Ninth Circuit Court of Appeals misapplied preemption principles to this case, fails on this very point. Consideration of the legal effect of Bain's misrepresentations does not require reference to the terms of the collective bargaining agreement.

The misrepresentations carry an impact of their own, completely separate from the suspension which was also imposed upon Tellez. The preemption doctrine is designed to assure a uniform standard for resolution of employment disputes. By making collective bargaining agreements susceptible to interpretation and enforcement by state law as well as federal law, that uniformity of standards is lost. However, the preemption doctrine need not be extended to every aspect of human interaction which may take place within the work environment. If consideration of state law rights does not require reference to the terms of the collective bargaining relationship and does not concern the

subject matter of working conditions or manner of imposing discipline, there is no danger of conflict between state and federal standards for collective bargaining agreements. Therefore, there is no reason to deprive an employee of his state law rights. To hold otherwise, as petitioner suggests, would be to turn employees involved in collectively bargained relationships into "second class citizens" with no access to the state-law rights afforded to other citizens.

1. Respondent's State Law Claim Of Defamation And Infliction Of Emotional Distress Are Non-Negotiable Rights.

In reversing the District Court's decision, the Court of Appeals held that California's defamation law establishes non-negotiable rights and obligations independent of any labor relationship. However, if consideration of those rights had required consideration of the terms of the collective bargaining agreement, they may have been preempted. In this case, the respondent's state tort claims do not in any way implicate the collective bargaining agreement.

Petitioner attempts to argue that under California Law, respondent Tellez consented to publication of the misrepresentations regarding his alleged job site drug deal, by his implicit consent to the terms of the contract. Petitioner's argument is specious. Clearly, if the collective bargaining agreement contains no reference to disciplinary letters, the respondent cannot have consented to the substance of the statements contained therein.

Petitioner further argues that the respondent consented to the publication of the misrepresentations contained in the letter, because even if the letter were not re-

quired under the terms of the agreement, letters of suspension were a matter of past practice. However, Petitioner has never offered evidence of a past practice, and raises that issue for the first time in this petition. Even the declaration of Richard S. Bain, (Petitioner's App. C) does not contain a reference to past practice. Furthermore, even if publication of such letters were a practice on the part of the employer, such practice would not refer to the terms of the collective bargaining agreement unless the publication and contents of disciplinary letters were the subject of an agreement between the employer and the union. Certainly, there could be no question of implied consent by respondent without such an agreement.

2. Respondent's Claims Are Not Inextricably Intertwined With The Labor Agreement, Nor Do They Interfere With The Central Role Of Arbitration In Federal Labor Law.

Petitioner seems to be arguing that because the collective bargaining agreement refers to discipline, every aspect of the manner in which such discipline is imposed should be preempted. Petitioner's argument misses the point of this case, because the Court of Appeals found that the respondent's tort claim did not arise from the discipline imposed in that same letter. Respondent's tort claims arise from the wholly gratuitous misrepresentations contained within the letter, and the extensive publication those statements received.

In this case, the employment relationship between Bain and Tellez is only relevant in that under California state law, taking advantage of a position of authority, such as that of employer over employee, may be an element of the outrageousness of the defendant's conduct. *Alcorn v. Anbro Engineering* (1970), 2 Cal.3d 493 at p. 498.

Petitioner turns to a recent California Supreme Court decision for support, but a careful review of that case shows it to be inapposite to the present case. In *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal.3d 517 (1987), the Court found that the Railway Labor Act preempted the plaintiff's state tort claims for defamation and infliction of emotional distress because " . . . all these acts were inextricably intertwined with the inevstigation and discharge procedures mandated by the agreement. Indeed, all of the alleged wrongful conduct took place during the ordinary course of these proceedings." *Id.* at p. 530. In this case, however, the alleged wrongful conduct is limited to the character of the misrepresentations contained in the December 29 letter, and its extensive publication. Since the letter itself is not a product of the collective bargaining agreement, the wrongful conduct did not take place during the ordinary course of contractually mandated proceedings.

Petitioner further argues that because the Court of Appeals did not consider past practice in the publication of suspension letters, *no* complaint regarding working conditions or disciplinary formalities could be resolved through arbitration. Again, however, petitioner misses the point. A dispute regarding working conditions or disciplinary formalities could have been resolved through the contract. In this case, Bain's misrepresentations did not touch on working conditions or disciplinary formalities. *If* the suspension letter had been mandated by the contract, then consideration of its contents, even statements not touching on working conditions or disciplinary formalities, may have been privileged or preempted, because it may have required reference to the terms of the collective bar-

gaining agreement. However, we do not reach that point in this case. In this case, the letter was not contractually mandated and does not arise from any aspect of the agreement between the company and the union, even if the company should take it upon itself to put disciplinary letters in writing. Consequently, the standards by which the contents and publication of the letter are judged do not require reference to the collective bargaining agreement.

B. The Ninth Circuit Court of Appeals' Decision Does Not Conflict With Another Circuit Court's Decisions Regarding Privileged Statements.

Petitioner disputes the lower Court's holding that Bain's letter to Tellez was not absolutely privileged as part of the disciplinary process. However, the petitioner's reliance on *General Motors v. Mendicki*, 367 F.2d 66 (10th Cir. 1966) and *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981) is misplaced in this Petition, as it was in the proceedings before the Ninth Circuit Court of Appeals. That Court held that it was not necessary to consider the issue of absolute privilege in this case, because the statements from which Tellez' tort claims arise were not made in the course of employer/union discussions or proceedings. In this case, Bain's letter of December 29, 1983, emanated entirely from management and did not represent any combined effort on the part of the employer and the union to investigate or resolve the dispute.

———o———

CONCLUSION

Limitations on state law rights should be very carefully imposed. When certain rights and remedies are negotiated into a collective bargaining agreement, when there is a danger of inconsistent state and federal interpretations of those rights and remedies, the courts are forced to impose some limitations in the interests of justice. However, it would go beyond the interests of justice to extend those limitations to deprive union members, subject to the terms and conditions of a collective bargaining agreement, of access to completely separate state law rights, consideration of which does not touch on the collective bargaining agreement.

Respectfully submitted,

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September 12, 1987

MOTION FILED
SEP 11 1987

No. 87-261

IN THE
Supreme Court of the United States
October Term 1987

PACIFIC GAS & ELECTRIC COMPANY,
Petitioner,
vs.
THOMAS TELLEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AND TEXAS EMPLOYMENT LAW COUNCIL AS AMICI CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AND TEXAS EMPLOYMENT LAW COUNCIL AS AMICI CURIAE IN SUPPORT OF THE PETITION

The California Employment Law Council (CELC) and the Texas Employment Law Council (TELC) (collectively "*amici*") hereby move, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief *amici curiae* in support of the petition for certiorari. Consent to the filing of this brief has been obtained from counsel for petitioner.* Counsel for the respondent has withheld consent.

Amici are voluntary, nonprofit organizations composed of more than 100 members, employing more than 600,000 persons, representing a broad segment of the employer community in California and Texas. *Amici* were formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment practices. Petitioner Pacific Gas & Electric Company is not a member of CELC or TELC.

Many members of *amici* are parties to collective bargaining agreements. *Amici* are concerned about the disrupting and destabilizing impact upon employers, unions and employees, of allowing individuals covered by collective bargaining agreements to circumvent agreed-upon grievance machinery. No one, including an already overburdened court system, benefits from duplicative litigation in multiple fora. Accordingly, *amici* request leave to file this brief, and they urge reversal of the court of appeals.

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* A copy of the consent letter is being filed concurrently with the Clerk of the Court.

WHEREFORE, *amici* respectfully request that their motion be granted.

DATED: September 11, 1987

Respectfully submitted.

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BRIEF OF AMICI

INTEREST OF THE AMICI

Amici respectfully refer the Court to the description of their interest presented in the motion for leave to file brief, to which this brief is attached.

REASONS FOR GRANTING THE WRIT

This case presents a question that has hopelessly divided the courts of appeals and that this Court reserved last Term in *Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4807 n.13 (June 9, 1987). The question is whether a worker covered by a collective bargaining agreement may sue in tort for the normal fare of alleged workplace wrongs, or whether the labor contract's grievance-and-arbitration procedure provides an exclusive remedy.

Amici believe that the Court implicitly resolved this issue, in favor of arbitration, in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The disarray in the courts of appeals since then, however, demonstrates that this is an issue on which further guidance is needed.

I
FACTS AND SUMMARY OF POSITION

A. Facts.[1]

Although the facts are described in some detail in the petition, a brief summary helps underscore why review is needed. Contrary to the Ninth Circuit's view, the present

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[1] The facts are drawn from the Ninth Circuit's decision, 817 F.2d 536 (9th Cir. 1987).

dispute is not well suited for a tort jury; rather, it should be "grist in the mills of the [labor] arbitrators." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960).[2]

Petitioner Pacific Gas & Electric Company (PG&E) believed that it had a drug-trafficking problem among its employees. The company began to investigate, and an eyewitness reported that respondent Tellez had bought cocaine on company premises. In reliance on this information, the company suspended Tellez for ten days, and reported the suspension and the surrounding circumstances in a memorandum to eleven company managers.

Tellez, aggrieved by the suspension, responded exactly as his labor contract instructed: he filed a grievance. After a multistep grievance procedure, the matter was heard in binding arbitration. Notwithstanding the company's evidence, the panel upheld Tellez' claim. As a remedy, it ordered three things: (1) full back pay; (2) interest; and (3) expunction from company records of the suspension memorandum.

Not content with winning, Tellez then sued, complaining about his suspension and its effects under a variety of contract and tort theories. The district court dismissed the suit, but the Ninth Circuit reversed. The present petition for certiorari followed.

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[2] Arbitrations over drug use or drug distribution are too numerous to recount. *E.g.*, *Vulcan Asphalt Refining Co.*, 78 Lab. Arb. (BNA) 1311 (1982) (Welch, Arb.) (reinstating grievant discharged for off-duty drug sales); *New York City Health & Hospitals Corp.*, 76 Lab. Arb. (BNA) 387 (1981) (Simons, Arb.) (sustaining discharge for drug distribution); *AMF Inc.*, 69 Lab. Arb. (BNA) 987 (1977) (Kleeb, Arb.) (reducing to a suspension a discharge for drug distribution).

B. Summary of Position.

The Court should grant certiorari for two reasons. First, the Court needs to resolve a hopeless conflict in the circuits on the questions presented. The plight of the present *amici* helps illustrate the dilemma employers face. The members of *amicus* CELC do business in the Ninth Circuit, and thus must follow the Ninth Circuit's decision. By contrast, the members of *amicus* TELC, from the Fifth Circuit, are bound by *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985), which (as shown below) holds precisely the opposite. Indeed, many members of *amici* operate extensively in both (and other) circuits, and thus are trying — somewhat schizophrenically — to operate under inconsistent rules. Review is necessary to achieve clarity and uniformity in the law, which are particularly desirable given Congress' objective of developing a uniform federal law of labor contracts. *Allis-Chalmers*, 471 U.S. at 211.

Second, the Court should review — and reverse — the Ninth Circuit's decision because it subordinates grievance arbitration to tort jury trials. This is precisely backward. Congress itself identified arbitration as "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d). And this Court for more than 25 years has held that grievance arbitration is an indispensable part of "a system of industrial *self*-government." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 580 (emphasis added). The Ninth Circuit has jarred these well-settled principles by substituting the tort jury for the labor arbitrator.[3] *Amici*

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[3] This Court has not previously considered the questions presented here. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966), held

(Footnote continued.)

respectfully suggest that this Court grant certiorari and reemphasize the primacy of arbitration in resolving workplace disputes.[4]

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that, under some exceptional circumstances, defamation claims were not preempted by sections 7 and 8 of the National Labor Relations Act ("NLRA"). *Farmer v. Carpenters*, 430 U.S. 290, 301-05 (1977), held that, under similarly exceptional circumstances, emotional distress actions could survive preemption under sections 7 and 8. Those decisions do not apply here. Both cases were brought by individuals against labor unions for extreme and outrageous conduct. Neither one was a suit, like the present one, in which an employee covered by a collective bargaining agreement sought to sue an employer over conduct already redressed in the grievance procedure. Thus, both *Linn* and *Farmer* involve only NLRA preemption — the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The present case, by contrast, involves the more far-reaching preemptive effect of section 301. *Allis-Chalmers*, 471 U.S. at 213-14 n.9 ("*Garmon* preemption [only] involves protecting the primary jurisdiction of the NLRB"; section 301 reaches farther because it flatly prohibits states from "provid[ing] a rule of decision where Congress has mandated that federal law should govern"). Thus, the Ninth Circuit correctly recognized that *Linn* and *Farmer* are inapposite here. 817 F.2d at 538 n.2.

[4] This case presents an issue very different from *Caterpillar* and four preemption cases in which the Court denied certiorari last Term: *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3775 (May 18, 1987); *Andersen v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3583 (June 22, 1987); *Malia v. RCA Corp.*, 794 F.2d 909 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3837 (June 15, 1987); *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308 (1986), *cert. denied*, 55 U.S.L.W. 3870 (June 26, 1987). In *Caterpillar*, the Court held that suits alleging breach of some preemployment contracts could not be removed to federal court. The Court did not, however, "intimate [a] view on the merits of . . . any of the preemption arguments" made in that case. 55 U.S.L.W. at 4807 & n.13. In all but one of last Term's cases, the issue was the enforceability of commitments made to someone to induce them to join (*Caterpillar*, *Andersen* and *Varnum*) or leave (*Malia*) the bargaining unit. *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (same). The other case, *Gonzalez*, involved a discharge allegedly in retaliation

(Footnote continued.)

II
REVIEW IS NECESSARY TO RESOLVE A HOPELESS CONFLICT IN THE CIRCUITS AND STATE SUPREME COURTS

The Court should grant certiorari because the Ninth Circuit's decision is totally inconsistent with the decisions in other circuits and at least one state supreme court.

A. This Court In *Allis-Chalmers* Emphasized The Primacy Of Arbitration Over Tort Jury Trials.

The starting point for analysis unquestionably is this Court's decision in *Allis-Chalmers*. In that case, an employee subject to a collective bargaining agreement sued his employer in tort, alleging "intentional[ ], contemptuous[ ], and repeated[ ]" wrongdoing. 471 U.S. at 206. The Wisconsin Supreme Court rejected the employer's preemption argument, relying essentially on the same rationale adopted by the Ninth Circuit in this case. The Wisconsin court asserted that the employee's suit did not arise under section 301 because "[u]nder Wisconsin law, the tort . . . is independent of [the] contract [claim]." *Id.* at 207.

This Court unanimously reversed. It held that the employee's state-law tort suit was preempted because "any attempt to assess liability here inevitably will involve

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for filing a worker's compensation claim. *See* 55 U.S.L.W. at 3870 (White, J., dissenting from denial of certiorari). None of those cases presented the question at issue here: whether a party covered by a labor contract can, by styling his complaint in tort, litigate garden-variety workplace disputes before both an arbitrator and a jury.

contract interpretation." *Id.* at 218. The court observed that, "[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210. The contrary result "would cause arbitration to lose most of its effectiveness as well as eviscerate a central tenet of federal labor-contract law under § 301, that *it is the arbitrator, not the court,* who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220 (emphasis added; citation omitted).

In light of these concerns, *Allis-Chalmers* set forth the test for section 301 preemption: A state-law claim is preempted whenever it "is inextricably intertwined with consideration of the terms of the labor contract," *id.* at 213, because "any attempt to assess liability . . . inevitably will involve contract interpretation," *id.* at 218.

B. The Lower Courts Now Are In Hopeless Disarray.

Despite the Court's unanimous decision in *Allis-Chalmers*, the lower courts have gone in many directions. A clear conflict exists on both the defamation and emotional-distress questions presented in this case. Further clarification is needed.

1. There is a clear conflict on the defamation issue.

Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985), is flatly inconsistent with the Ninth Circuit's decision here. In *Strachan*, two bargaining-unit employees were suspected of using illegal drugs; both were suspended and subjected to medical tests. Word of the company's suspicions spread through the plant. When investigation failed to substantiate

the company's suspicions, the employees were reinstated with full back pay. *Id.* at 704, 706. They sued under a variety of tort theories, including defamation. The district court dismissed the suit on preemption grounds, *id.* at 704, and the court of appeals affirmed.

Focusing specifically on the defamation claim, the Fifth Circuit emphasized that management in the collective bargaining context of necessity must have the latitude, free from fear of tort litigation, to investigate and punish suspected misconduct.[5] That latitude of course is not without limits, but an employee's recourse must be through the grievance procedure, not in a tort jury trial. *Id.* at 705.

Similarly, in *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal. 3d 517, 235 Cal. Rptr. 292 (1987), the California Supreme Court held preempted very similar defamation claims.[6] There, DeTomaso, a bargaining-unit employee, came under suspicion for theft. The airline investigated and ultimately confronted DeTomaso with its suspicions. In the course of the investigation, the allegations were repeated to certain third parties. *Id.* at 530-31. DeTomaso ultimately was terminated for "fraud, dishonesty and abuse of company policy." *Id.* at 523. DeTomaso grieved under the collective bargaining agreement and obtained a favorable settlement, including reinstatement,

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[5] The court of appeals explained:

> To hold the company guilty of defamation for making such inquiries, even though they became known in the plant, would simply mean that the company could never undertake to investigate a possible disciplinary situation in routine and proper ways . . . .

768 F.2d at 706.

[6] Pan Am, an airline, of course is covered by the Railway Labor Act rather than the LMRA. The California Supreme Court appeared to recognize that the same general preemption principles apply. *Id.* at 528 (citing *Allis-Chalmers*).

back pay and expunction of the allegations from company files. *Id.*

Meanwhile, however, DeTomaso had sued in state court under a variety of tort theories, including defamation and infliction of emotional distress. A jury awarded $565,000 in damages. *Id.* at 524.[7] On appeal, the California Supreme Court held the action preempted:

> *The parties to [a collective bargaining] agreement must be allowed to perform their duties without judicial interference in all but the most outrageous of cases. . . .* For the jury or a court to second guess whether the required investigation was "reasonable" under the circumstances here would undermine the exclusiveness of those procedures.

Id. at 530 (emphasis added).

Strachan, DeTomaso and several district court cases[8] are flatly contrary to the Ninth Circuit's decision here.[9]

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[7] The trial court ordered a remittitur to $207,000, or in the alternative a new trial on damages. *Id.* at 524.

[8] *E.g., Scott v. General Motors Corp.*, 645 F. Supp. 914, 916 (E.D. Mo. 1986) (dismissing defamation claim because "[t]he preclusive effect of § 301 . . . extends beyond suits alleging contract violations; it also affects state law tort claims"); *Gregory v. Simon Brothers, Inc.*, 640 F. Supp. 1252, 1256 (N.D. Ind. 1986) (preemption found because "the allegations of defamation are inextricably bound" to the labor contract); *Green v. Hughes Aircraft Co.*, 630 F. Supp. 423, 427 (S.D. Cal. 1985) (theft allegations; "countenance of the instant [defamation] claim would impinge upon the primary federal labor policy favoring the expeditious resolution of labor disputes by private grievance/arbitration").

[9] This Court should not regard the Ninth Circuit's decision as an aberration that can be ignored. The Court of Appeals for the Seventh Circuit very recently relied on the Ninth Circuit's decision here. *Keehr v. Consolidated Freightways, Inc.*, 825 F.2d 133 (7th Cir. 1987) (privacy claim is not preempted).

2. There also is a clear conflict on the emotional-distress issue.

The Ninth Circuit's decision also conflicts with other circuit decisions on the emotional-distress issue. The present panel (Pregerson, Choy and Goodwin, JJ.) concluded that the tort survived because it was based on "rights and duties independent of the employment relationship," and that "to decide the claim a court need not refer to the labor agreement." 817 F.2d at 539.

Many cases hold to the contrary. For example, in *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), the court (Wisdom, Wallace and Anderson, JJ.) declared numerous torts preempted, including infliction of emotional distress. In that case, a union welder alleged that his former employer "engaged in outrageous and unprivileged conduct with the intent of harassing him and causing him emotional distress." *Id.* at 1475. The court noted that the alleged wrongful acts all stemmed from disputes concerning employment or work conditions, most of which disputes tracked grievances that had or could have been processed under the labor contract. *Id.* at 1476. His tort claims, therefore, were preempted; his "exclusive remedies lay under the grievance procedures of the collective bargaining agreement and in federal remedies for retaliatory discharge." *Id.*

The Court of Appeals for the Tenth Circuit held essentially the same thing in *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982). There, an employee sued for wrongful discharge and infliction of emotional distress. The district court allowed the latter claim to proceed, but the court of appeals reversed. It held:

> If the pleading of emotional injury permitted aggrieved employees to avoid the impact of

> [federal law], the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes . . . without resort to the courts, would be thwarted.

Id. at 704 n.4, *quoting Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).[10]

Several other circuit[11] and many district-court[12] cases

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[10] *Viestenz*, a pre-*Allis-Chalmers* case, probably confused its analysis somewhat by relying in part on cases applying the *Garmon* preemption doctrine. *See, e.g.*, 681 F.2d at 702-03. But the result under section 301 preemption analysis follows *a fortiori*. *Allis-Chalmers*, 471 U.S. at 213-14 n.9 (*Garmon* requires a balancing test; section 301, by contrast, preempts absolutely claims that fall within its reach). *See* note 3 *supra*.

[11] *E.g., Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1353 (9th Cir. 1985) (emotional-distress claim preempted; "argument that the remedies available to [plaintiffs] through arbitration (reinstatement and back pay) would not compensate them for their emotional distress is . . . meritless"); *Carter v. Smith Food King*, 765 F.2d 916, 921 (9th Cir. 1985) (emotional-distress claim preempted because it "arose out of the same acts and conduct which formed the basis of [plaintiff's] section 301/breach of duty claims"); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 429 (9th Cir. 1983) (claims are preempted; "the critical inquiry is whether the controversy (the harassments) was identical to or different from" the wrongful acts alleged in arbitration).

[12] *E.g., United Auto Workers v. Park-Ohio Industries, Inc.*, No. C 85-1761 (N.D Ohio May 1, 1987) (emotional distress claims are preempted); *Weidner v. General Battery Corp.*, No. 86-3555 (E.D. Pa. April 9, 1987) (emotional distress claim is preempted even though plaintiffs "have already pursued their contractual remedies and now seek further relief"; even though one plaintiff "is not seeking relief for contractual violations, but rather for his physical injuries"; and even though plaintiff "now seeks additional relief which the arbitrator is unable to provide"); *Mann v. Georgia-Pacific Corp.*, 651 F. Supp. 580, 582 (E.D. Ark. 1986) (emotional-distress claim is preempted because plaintiff's claim is "dependent upon the terms of the collective bargaining agreement").

hold similarly. There is a clear conflict that should be resolved.[13]

C. In Light Of *Caterpillar*, There Is A Particular Need For This Court To Grant Review.

In *Caterpillar*, the Court held that, whatever the merits of preemption as a *defense*, many putative state-law claims normally were not subject to removal. 55 U.S.L.W. at 4807 & n.13.[14] The burden of the preemption inquiry, therefore,

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[13] The Ninth Circuit purported to distinguish *Olguin* on the ground that the collective bargaining agreement in the present case was "silent on work conditions, and vague on disciplinary formalities. It neither requires nor regulates suspension letters." 817 F.2d at 539. This is a distinction without a difference. The Ninth Circuit, before finding preemption, would seem to require a contract clause that says, "The company shall have the right to disseminate among members of management the results of disciplinary investigations." Of course, no collective bargaining agreement contains such detail. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 579 (emphasizing the arbitrator's broad latitude, and holding that "[o]ne cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages").

[14] In the present case, Tellez sued in state court, alleging breach of a contractual covenant of good faith and fair dealing, infliction of emotional distress, and defamation; PG&E then removed the case to federal court. The posture of this case differs from *Caterpillar* in several respects. Unlike *Caterpillar*, this case was removed largely in reliance on the covenant claim, which is implied in the employment contract — the collective bargaining agreement. Thus, the case at bottom is a suit arising under section 301. (Indeed, in the Ninth Circuit, Tellez conceded that the case was properly removed. 817 F.2d at 537.) *Caterpillar*, by contrast, involved claims that expressly were *not* based on the collective bargaining agreement. If, however, the Court were to believe that the federal court in this case lacked removal jurisdiction, it should grant the petition, vacate the Ninth Circuit's decision, and remand the case for reconsideration in light of *Caterpillar*.

increasingly will fall to the state courts. *See id.* at 4807. That being so, there is even more urgency in granting review here. The federal courts, which presumably are the most attuned to questions of federal law, themselves are in hopeless conflict on the preemption question. As the bulk of the litigation moves to state courts, confusion is certain to proliferate unless this Court grants certiorari.

III
THE COURT SHOULD GRANT CERTIORARI TO REEMPHASIZE THE PRIMACY OF ARBITRATION IN RESOLVING WORKPLACE DISPUTES

A. Arbitration Is The Method Of Choice For Resolving Day-To-Day Workplace Disputes.

Arbitration must displace tort jury trials where, as here, the allegedly wrongful conduct arises directly out of the investigation of suspected misconduct or poor performance, or the processing of discipline or grievances flowing from such an investigation.[15] For collective bargaining to work, employers must have reasonable latitude to act. Federal law must provide a measure of breathing space for employers to administer collective bargaining agreements — and, within reasonable bounds, even to make mistakes in doing so — without being haled before tort juries bent on "dispens[ing] [their] own brand of industrial justice." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

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[15] *Amici* do not, of course, suggest that federal law preempts every defamation of, or infliction of emotional distress upon, a bargaining-unit employee. The Court need resolve only the narrow issue presented by the routine factual scenario here. Certainly there may be cases in which an employer or supervisor so far exceeds the course and scope of employment as to sever the nexus to the collective bargaining agreement.

Tort litigation is not well suited to the workplace. The California Supreme Court noted very recently that employer-employee conflicts *routinely* arise out of "demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances"; these are "a normal part of the employment relationship." *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308 (1987).[16] Federal labor law cannot abide a situation in which every discipline or discharge arbitration can be recast as a state-law tort, with the outcome dependent upon diverse juries' varying assessments of reasonableness, privilege and the like.[17] As the Fifth Circuit

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[16] As this Court has observed, "The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalitites that may be commonplace in various labor contexts." *Farmer v. Carpenters*, 430 U.S. at 305-06.

[17] The case for preemption perhaps would be less compelling if state courts had a coherent and consistent law of privilege. But the privilege cases are all over the map. Some states recognize an absolute privilege for statements made in at least some grievance proceedings. *E.g., Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Sturdivant v. Seaboard Service System, Ltd.*, 459 A.2d 1058 (D.C. 1983). Other states apply only a qualified privilege. *E.g., Ezekiel v. Jones Motor Co., Inc.*, 374 Mass. 382, 372 N.E.2d 1281 (1978); *Henthorn v. Western Maryland Railroad Co.*, 226 Md. 499, 174 A.2d 175 (1961). Several cases, although not finding preemption, seem to apply a federal common law of privilege to state tort claims. *E.g., Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981); *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966); *Barnes v. Avis Rent A Car System, Inc.*, 466 F. Supp. 907 (D.D.C. 1979). And some courts, like the Ninth Circuit in the present case, muddle the distinction between privilege and preemption. 817 F.2d at 538 n.3 (citing the law of privilege in an effort to distinguish a preemption precedent cited by PG&E).

Moreover, privilege is not a satisfactory substitute for preemption for at least three additional reasons. First, some of the privilege cases turn on whether the defamatory statement was made in a formal grievance

(Footnote continued.)

has held, a plaintiff should not be able to create

> major state court claims out of matters which are all part of . . . grievance procedure[s] ending in binding arbitration. *To hold otherwise in this case would subject thousands of grievance procedures involving disciplinary investigations and disciplinary actions . . . to lawsuits asserting state court claims.* . . . [Without preemption,] the critically important aspect of collective bargaining which is involved in the establishment of the grievance procedure . . . would be destroyed.

Strachan v. Union Oil Co., 768 F.2d at 705 (emphasis added).

This case well illustrates why tort jury trials should not be injected into the collective bargaining system. In support of respondent's claims, he alleges as "wrongful acts" only that (1) the PG&E security department investigated on-the-job drug use by interviewing several employees (Complaint ¶¶ 6-9); (2) the results of the investigation were shared within management (*id.* ¶ 24); and (3) respondent was suspended for ten days as a result (*id.* ¶¶ 10-11). The first two allegations simply cannot be actionable if employers are to have any leeway to investigate suspected employee misconduct; the third allegation was fully redressed in the grievance procedure. *Everything alleged is either a routine incident of life in the workplace or something susceptible to resolution in arbitration.* If this

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meeting. The doctrine thus offers incomplete protection to managers investigating misconduct and processing grievances. Second, and in any event, the privilege defense often cannot be raised on the face of a complaint. Only preemption disposes of suits effectively at the threshold. Third, the privilege issue in most cases is tried to a jury. Even if privilege law were consistent — which it is not — the vicissitudes of the jury-trial process are incompatible with federal labor policy.

presents a state-law jury question, as the Ninth Circuit held, then state law can have no place here.[18]

This Court in *Allis-Chalmers* warned the lower courts to reject crafty pleadings that "restate[ ] as . . . tort claim[s]" the "whole range of disputes traditionally resolved through arbitration." 471 U.S. at 219. Yet, under the lower-court panel's view of preemption, it is hard to conceive of an arbitration that could not be recast as a tort by interlarding the complaint with boilerplate allegations of malice, spite, suffering and distress.

This is *not* a "labor vs. management" dispute. Labor and management certainly have their differences, but the scope of section 301 preemption generally is not one of them. Labor and management — and individual employees — share a common interest in the fast, inexpensive and fair procedure that arbitration offers.[19] But tort trials in many

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[18] It would be anomalous to deny management leeway to conduct thorough investigations and deliberations in disciplinary cases. Collective bargaining agreements typically impose "just cause" limitations on discipline and discharge. It is *presumed* that management will not impose discipline in the absence of a thorough factfinding in advance. *E.g.*, F. Elkouri & E. Elkouri, *How Arbitration Works* 673 (4th ed. 1985) ("the failure of management to make a reasonable inquiry or investigation before assessing punishment [often is] a factor (sometimes the sole factor) in the arbitrator's refusal to sustain the discharge or discipline") (citing numerous cases). Thus, the Ninth Circuit's holding places management between a rock and a hard place. Employers must carefully investigate and deliberate to win in arbitration, but they risk tort liability for doing so.

[19] The Court often has praised arbitration for its speed and efficacy. *E.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 558 (1964) ("the prospect of a speedy arbitrated settlement of the dispute" and the elimination of the "increased costs" of litigation, fulfill "the aims of national labor policy"); *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690, 691 (7th Cir. 1987) (the "arbitration clause in a collective bargaining agreement is supposed to ensure speedy resolution of disputes"; the court

(Footnote continued.)

California state courts take place *five years* after the filing of a complaint. *See generally Minkin v. Levander*, 186 Cal. App. 3d 64, 73, 230 Cal. Rptr. 592 (1986) (noting "the law explosion and the resulting backlog of cases in the [state] courts"). Allowing workplace disputes to fester for years before resolution is incompatible with sound collective bargaining.[20] The grievance-and-arbitration process simply cannot be subordinated to tort jury trials.

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bemoans the "depressingly large number of recent cases" brought by persons to circumvent arbitration).

[20] Indeed, employers will have very little incentive to enter into collective bargaining agreements and submit to grievance arbitration if they still must defend themselves in court as a result of activities reasonably related to discipline and grievance processing. One of California's leading union lawyers made the point eloquently last year:

> Once individuals may, in the collective bargaining context, bring wrongful termination cases and call them outrageous conduct, call them intentional infliction of emotional distress, *the result is you've said to the employer and the union, "Why have arbitration?"*
>
> *DeTomaso* is the perfect example. He got a full remedy in a grievance procedure, a reinstatement with backpay, so he sued only for emotional distress and for defamation . . . [He won] almost $200,000 in damages, . . . through a lawsuit. *It renders the grievance procedure a nullity and an employer's going to say to the union, "Why should I agree to it?"*

Proceedings of the 1986 Southern California Labor Law Symposium (remarks of David Rosenfeld), *reprinted in* 9 I.R.L.J. 1, 24 (1987) (emphasis added).

B. The Ninth Circuit's Opinion Reflects Confusion About The Nature Of Arbitration And The Judicial Role In Labor Contract Interpretation.

The Ninth Circuit purported to accept the general principles set forth above, but held that tort suits such as this one involve issues entirely separate from those that could be raised and remedied in the grievance-and-arbitration procedure. 817 F.2d at 839. The court of appeals was wrong in two respects. First, arbitrators can and do consider allegations precisely like those at issue here, and they can provide a remedy. Second, and more fundamentally, by prejudging the likely outcome of such a claim in arbitration, the court of appeals violated this Court's oft-repeated command to let arbitrators, not judges, interpret labor contracts.

1. Arbitrators can and do hear and resolve claims like those brought by respondent.

The court of appeals erred in stating that arbitrators cannot resolve disputes, or consider remedies, similar to those at issue here.[21] The specific arbitration clause in this case contains a broad delegation of authority.[22] It also

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[21] *See* note 2 *supra*. In addition, as union attorney Rosenfeld put it:

> [D]on't forget that when it comes to that arbitration, we have the right to ask [arbitrators] *not only for backpay and reinstatement but for damages for infliction of emotional distress and for punitive damages.* It's not a usual remedy, but there's nothing [absolute] about it.

9 I.R.L.J. at 25 (emphasis added).

[22] The contract provides:

> [M]utual resolution of disputes through a collectively bargained grievance process is the hallmark of competent

(Footnote continued.)

explicitly empowers *the arbitrator* to resolve even the threshold question of "whether a matter is a proper subject for the grievance procedure." Art. 102.2. Thus, in concluding as a matter of law that an arbitrator could not consider certain claims, the court of appeals plainly erred.[23]

2. The court of appeals exceeded its jurisdiction by purporting to interpret the contract in place of the arbitrator.

The court of appeals not only evaluated incorrectly what claims an arbitrator could consider; the court's primary error was undertaking that inquiry at all. Just last year, the Court reminded lower courts that they "*have no business* weighing the merits of the grievance, . . . or *determining whether there is particular language in the written*

> industrial self-government. Therefore, apart from those matters that the parties have specifically excluded [from arbitration], *all disagreements shall be resolved within the scope of the grievance procedure.*

Art. 102.1 (emphasis added).

[23] The whole point of collective bargaining is that employers and unions can establish whatever kind of dispute-resolution system — and whatever remedies — they desire. That is why the court of appeals was wrong even assuming, *arguendo*, that Tellez could not obtain certain remedies under the collective bargaining agreement. As this Court has recognized, the possible existence of differing remedies under federal and state law is precisely why the preemption doctrine exists. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ___, 555 U.S.L.W. 4471, 4474 (April 7, 1987) ("the powerful pre-emptive force of § 301 of LMRA displace[s] all state actions . . . even when the state action purported to authorize a remedy unavailable under the federal provision"); *San Diego Building Trades Council v. Garmon*, 359 U.S. at 246-47 ("[o]ur concern is with delimiting areas of conduct that must be free from state regulation if national labor policy is to be left unhampered. . . . Even the States' salutary effort to redress private wrongs or grant compensation for past harm" may reach too far into a protected sphere).

instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 54 U.S.L.W. 4339, 4341 (April 7, 1986) (emphasis added), *quoting United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960).

The court of appeals thus was fundamentally wrong. It correctly acknowledged that a tort claim will be preempted if " 'evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.' " 817 F.2d at 537, *quoting Allis-Chalmers*, 471 U.S. at 213. However, the court of appeals then did what it acknowledged it should not do: it considered the terms of the labor contract and concluded that respondent's claims were not cognizable under it.[24] What the court failed to recognize is that, by finding it necessary to perform that inquiry, it usurped the arbitrator's role and decided for itself what the contract provided and what the parties contemplated. The court of appeals' opinion thus inadvertently makes the case for preemption. As this Court held in *Allis-Chalmers*, preemption exists where, as here,

> *the* [*lower*] *court based* [*its analysis*] not solely on its . . . understanding of the state tort, but also *on assumptions about the scope of the contract provision which it had no authority to make* . . . . The assumption that the labor contract creates no implied rights is not one that [the courts] may make.

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[24] The court of appeals reasoned that "[t]he agreement simply does not govern" the tort claims; "its grievance mechanism is not equipped to redress [them]"; under the contract, "the grievance committee [had] no authority to decide whether PG&E had acted outrageously"; and "it could provide no remedy for such behavior." 817 F.2d at 538-39.

Id. at 214-15 (emphasis added).[25]

IV
CONCLUSION

The Court should grant the petition to resolve the conflict in the circuits and to reaffirm that arbitration, not tort litigation, is the method for resolving disputes involving employees covered by collective bargaining agreements.

In the alternative, if the Court were to believe that the lower federal courts lacked jurisdiction, the Court at a minimum should grant the petition, vacate the judgment below, and remand to the Ninth Circuit for reconsideration in light of *Caterpillar*. *See* note 14 *supra*.

DATED: September 11, 1987

Respectfully submitted.

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[25] *Cf. Hasten v. Phillips Petroleum Co.*, 640 F.2d at 279 (libel action not cognizable because it "clearly call[s] for adjudication of the merits of the allegations of dishonesty which were the core issue in the grievance proceeding").